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I. INTRODUCTION

Charles Harkness and David Langdell wanted to raise a child. They would not attempt adoption, either domestic or foreign, because they feared the intolerance of their gay partnership that their friends had experienced here and abroad. Instead, they accepted an offer from Mary, a mutual friend, to bear them a child if they would pay for her medical expenses. The men commingled their own sperm in a syringe, which Mary used to impregnate herself. Mary bore the child at her home with the assistance of a midwife, and delivered the child to Charles and David. The birth certificate identified the child as Edward, the mother as "C. Harkness," and the father as David Langdell.[1]

Crispina and Mark also wanted a child, but Crispina's partial hysterectomy had frustrated their hope. So they engaged the services of a fertility clinic, where doctors extracted some of Crispina's eggs and fertilized them in a laboratory with Mark's sperm. The fertilized eggs were then implanted in the womb of Anna, whom Crispina and Mark had agreed to pay $10,000 for bearing them a child. The final installment of the fee was to be paid six weeks after the child's birth, and after Anna had relinquished her parental claim. During the pregnancy Anna became distrustful of Crispina and Mark, and two months before the child was due she demanded that they immediately pay her the full $10,000 or she would refuse to turn over the child. Crispina and Mark filed a declaratory judgment action to force Anna to comply with the contract, and she responded with a suit to assert her parental rights.[2]

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* Judge, Maine District Court; Visiting Scholar, Harvard Law School, 2000. I extend my thanks to Attorney Susan L. Crockin and Professors Ilana Hurwitz and David Westfall for their advice about drafts of this article. I received generous research assistance from Attorneys Judy Berry, Susan Crockin, Theodore Folkman, David Hankey, and Jessica Maurer, Dr. Gary L. Gross, and Dr. Fredericka Wolman, and Professors Ilana Hurwitz and John J. Sampson. In addition, Professors Martha Minow, Peter Murray and Jennifer Wriggins, and Chief Justice Vincent McKusick provided invaluable support for my application to study at Harvard, and Gail Hupper, Deputy Director of Harvard's Graduate Program, was mercifully patient with the tribulations of that application. My thanks to Liza Draper and Richard Seamon for not only giving me a place to stay in Boston but also introducing me to Dr. Gross and Attorneys Crockin and Hankey. Finally, I thank the judges of the Maine trial courts for covering my dockets and my beloved wife, Kathy, our family, while I researched and wrote this Article.

1. This brief history is based, in part, on my interview of two gay partners who are in fact raising a child born to a surrogate. I have changed all of their names. "Mary" is now expecting the couple's second child.

2. Johnson v. Calvert, 851 P.2d 776, 777-78 (Cal. 1993). It is normal, in vitro fertilization (IVF) practice to implant several embryos because the likelihood that any single embryo will develop into a fetus is small. ROYAL CANADIAN COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT (1993) [hereinafter ROYAL COMMISSION REPORT] at 527-28 and, generally, Chapter 18.

Stories like these are the product of recent medical advances that permit human conception without intercourse and that, in combination with sociological changes in our country,[3] dramatically enlarge the population of adults who can produce or raise children. The legal price for this broadening of opportunity, however, is a diminishment of certainty: We are no longer sure whom we should identify as a child's parents. Consider the preceding examples. How many parents should Edward have? Who are they? And who between Crispina and Anna is the child's mother?

These are important questions, of course, because ready answers will quickly dampen disputes about custody[4] and will immediately establish support obligations[5] and the children's eligibility for health insurance, for inheritance,[6] for Workers' Compensation benefits,[7] and for Social Security survivor benefits.[8] But as important as those questions may be, there is no law in Maine that answers them.[9] In fact, there may not be answers anywhere, at least for the present. The reason is twofold. First, the questions are too new. Only within the last twenty years has medical science made it possible for a woman to bear a child to whom she is genetically unrelated, as Anna would be in the example above.[10] Since then,

3. *See infra* text after note 24.

4. A "presumption for one parent or the other" would afford a "basis for predicting which of two fit parents will prevail and thereby [increase the] possibility that the parents can resolve the conflict out of court." MARTHA A. FIELD, SURROGATE MOTHERHOOD 126 (1988).

5. ME. REV. STAT. ANN. tit. 19-A, § 1504 (West 1998).

6. ME. REV. STAT. ANN. tit. 18-A, § 2-103 (West 1998).

7. ME. REV. STAT. ANN. tit. 39-A, § 215 (West 2001).

8. 42 U.S.C. §§ 402(d), 416(e) (West 1991 & Supp. 2000); *see also* Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127 (2000). For an exhaustive discussion of the benefits of parental identification in the District of Columbia, see *In re M.M.D.*, 662 A.2d 837 (D.C. App. 1995).

9. No Maine statute directly addresses the Crispina and Anna problem. One statute does make reference to "biological parents." ME. REV. STAT. ANN. tit. 19-A, § 1503 (West 1998). ("A child born out of wedlock is the child of that child's biological parents and is entitled to the same legal rights as a child born in lawful wedlock . . . ."). The term "biological," however, is not defined, so the "biological" maternal parent of the child Anna bears could be either Crispina or Anna. If Anna were impregnated with a donated embryo, the definition of a "biological" mother would become murkier. *See infra* text after note 45. No Maine statute contemplates the parental responsibilities of people who hire surrogates and gestational carriers to produce children but are unrelated to the children genetically. No Maine statute addresses the parental responsibility of sperm or egg donors. Maine's paternity statute, ME. REV. STAT. ANN. tit. 19-A, §§ 1551-1570 (West 1998), refers to the "father" and the "mother" without defining either term. Our Probate Code uses the term "issue," which is defined as "all [a person's] lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this Code"; the term "child" is defined as "any individual entitled to take as a child under this Code by intestate succession from the parent . . ."; likewise, the term "parent" is defined by use of the terms "parent" and "child." ME. REV. STAT. ANN. tit. 18-A, § 1-201 (21), (3), (28) (West 1998). Maine law assumes that a child should have two parents and that they should be of opposite genders, but does not analyze or explain those assumptions and therefore does not directly address Edward's problem.

10. During a meeting of the National Conference of Commissioners on Uniform State Laws in 1972, one of the members observed: "I have heard of [embryo implantation] theoretically. I do not know of a single case of a fertilized egg having been retransplanted into another woman and carried to term. I think they have . . . gone up to salamanders on that, but they haven't progressed beyond the salamanders." National Conference of Commissioners on Uniform State Laws, *Minutes of a meeting concerning the Uniform Legitimacy Act* (August 11, 1972).

this revolution in technologically-assisted reproduction has accelerated, forever refining and expanding the science of conception[11] and thereby extending the possibility of parenthood to increasing varieties of previously infertile people.[12] Second, the subject is too complicated. It combines traditional family law with questions of medical technology, genetics, medical and legal ethics, psychology, sociology, constitutional law, theology, contract, gender equality, and gay and lesbian rights. We are not sure who Edward's parents should be, or whether Anna can qualify as a mother, because this spectacular, free-wheeling kaleidoscope of issues has been pulverizing social codes based on what everyone used to believe were immutable laws of human reproduction.

I will attempt to describe this phenomenon, and its effect on how we identify parents, in a discussion that pivots around the examples with which I began. I open with an overview of our historical method of identifying parents: the woman who gave birth and, by traditional implication, her husband. Those rules, the presumptions of biology and of legitimacy, respectively, do not help resolve Crispina's and Anna's dispute because technological and sociological developments, which I then describe in some detail, have obliterated the rules' usefulness.

What we are left with is a parental conundrum, of which Edward's situation is a relatively simple version. Under some circumstances it is possible to identify six candidates for the parenthood of a single child.[13] This is a complicated puzzle, and I will take some time to explain it. I will then discuss the variety of proposals, academic and judicial, for winnowing that bushel of would-be parents to a manageable number. Each of those proposals is grounded in some sound principle, so each bears some merit. On the other hand, none of them resolves all of the questions that Edward and Crispina and Anna force us to ask, so none is entirely adequate. To make matters worse, few of them are consistent with each other, and some are broadly contradictory. Depending on which proposal you choose, you can plausibly argue that Edward's parents should be Charles and David; Charles, David and Mary; Mary and Charles or David. Likewise, you can argue that either Crispina or Anna should be the child's mother, or that they both should be, or that

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The first IVF child, Louise Brown, was born in England in 1978. Over the next few years researchers and clinicians in Australia "initiated the practice of egg donation, where one woman's egg was retrieved, fertilized *in vitro*, and transferred to another woman's uterus." ROYAL COMMISSION REPORT, *supra* note 2, at 508.

11. The first pregnancy from frozen sperm was achieved in 1953; the first baby conceived from a frozen embryo was born in 1984; the first babies (twins) conceived from frozen eggs were born in 1997. Jeffrey Kluger, *Eggs on the Rocks*, TIME, Oct. 27, 1997, at 105.

12. In vitro fertilization, discussed in the text *infra* following note 44, is a technique that was originally developed to assist in the pregnancies of women with imperfect fallopian tubes. ROYAL COMMISSION REPORT, *supra* note 2, at 507. The same technique can now be used to impregnate post-menopausal women. Susan Chira, *Of a Certain Age, and in a Family Way*, N.Y. TIMES, Jan. 2, 1994, at 5 (59-year-old pregnant woman).

For men with low sperm counts, "the relatively new technique of intracellular sperm injection has made it possible for males who would have been declared absolutely infertile to conceive." Statement by Gary L. Gross, M.D., Clinical Instructor, Dep't Obstetrics and Gynecology, Harv. Med. School (Nov. 29, 2000) (on file with the Author).

13. There could be two genetic parents (the donors of the sperm and of the egg), the woman who gestates the fetus, her husband (presumed under state law to be the child's father), and the two intended parents (who bought the sperm or the embryo, and hired the gestational mother). *See* chart *infra* text accompanying note 48.

you cannot tell unless you hold a hearing to determine which would be a better parent for the child. Existing state statutes are equally inconsistent, and the newly proposed Uniform Parentage Act of 2000 addresses only part of the problem. In short, everybody is right, and everybody else is either entirely or partly wrong. We find ourselves in theoretical gridlock without any foreseeable likelihood of relief.

Meanwhile people like Edward, Crispina, and Anna demand answers. As one court put it, "[a] child cannot be ignored. Even if all means of artificial reproduction were outlawed . . . courts will still be called upon to decide who the lawful parents really are . . . . These cases will not go away."[14] In response to that imperative, I forgo further search for a comprehensive formula to define "parent" in every possible circumstance of assisted reproduction—a parental Theory of Everything—and, instead, I offer a statute that I hope represents a pragmatic solution to the single, discrete issue that my opening illustrations raise: Who are the parents of a child born to a surrogate mother like Mary or a gestational carrier like Anna? I have derived my proposed statute from provisions of the nascent Uniform Parentage Act, but I have amended or expanded its terms in order to address some significant, real-world issues that the Act overlooks. The thrust of my proposal is to identify the parents upon the children's births, just as we do (or attempt to do) with conventional parents. Moreover, I recommend that we do so without regard to the children's best interests. As ironical as that may sound, it turns out to have been what we have always done: Our traditional presumptions of biology and legitimacy have never addressed any of a child's best interests except subsistence and, recently, protection from harm. I argue that we must preserve that seemingly insouciant policy, however alluring a child's best interest may be, lest we compound the complexities that we already face.

I understand that the statute I propose may not be the final solution to this particular problem.[15] Nor do I consider the many other problems that emerging conception techniques and evolving sociology have already produced,[16] and I sim-

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14. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998).

15. "[It] seems likely [that] society is going to experiment with different solutions and try approaches that may be open to modification after a few years' experience with them . . . ." FIELD, *supra* note 4, at 60.

16. Those problems include the following: Who are the parents of children conceived by donated sperm or eggs and not born to surrogates or gestational carriers? Should donors of sperm or eggs be responsible for child support? What is the default rule for identifying parents of a child conceived through intercourse and born to an unmarried woman? To what extent should we regulate what is now the free market for genetic material? How old can an embryo be before it becomes unethical to use it for medical research? Is it ethical to sell embryos to adults who cannot conceive? Is it ethical to extract oocytes (potential eggs) from female fetuses? Is it ethical to produce children for the purpose of creating cells whose genetic composition is compatible with, and therefore available for the medical treatment of, their older siblings? Is infertility a medical condition for which medical insurance should be available? Is it socially responsible for us to devote large sums to assisted reproduction rather than to medical care for the poor? Is it ethical to promote assisted reproduction over adoption? Does assisted reproduction threaten to shackle modern women to the traditional function of child-bearers from which they have struggled to free themselves? Is it ethical for a woman to attempt pregnancy when her remaining life expectancy does not exceed the 18 years of her child's minority? What access to their genetic predecessors should be permitted for children of donated genetic material? How many parents does a child need? Should second-parent adoptions be permitted? How many parents should a child be allowed to inherit from? Who owns frozen embryos? Is dictating the genetic attributes of your child-to-be socially responsible? What does "family" mean?

ply wonder at the convolutions that the future will bring.[17] But we cannot luxuriate in theoretical debate any longer; we have to start immediately, and somewhere. I offer a single point of departure, from which we may gradually explore the frontier that has suddenly appeared before us.

II. TRADITIONAL MOTHERHOOD, THE PRESUMPTION OF LEGITIMACY, AND MODERN CHALLENGES

A. The Traditional Rule

It used to be said that maternity was a matter of fact and paternity a matter of opinion.[18] Until recently, a child's mother was irrefutably the woman who had been visibly pregnant and who then gave birth—the so-called presumption of biology.[19] Until recently, on the other hand, the father could never be identified objectively, unless he volunteered his responsibility, because few if any could or would have catalogued the incident of intercourse and nobody could observe the conception. Against this ubiquitous uncertainty a presumption arose that the mother's husband was the father.[20] Not only did this rule reflect a true probability in most families, but it also served the social goal of preventing children from being deemed illegitimate and becoming wards of the state.[21] Furthermore, the presumption could only be rebutted by proof that the husband's participation in the conception had been impossible, and neither the husband nor the wife was permitted to testify to that impossibility.[22] This evidentiary handicap diminished the incidence of "suits against husband and wife asserting that their children are illegitimate" and thus promoted social harmony.[23]

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17. Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 DUKE J. GENDER. L. & POL'Y. 5, 6 (1995).

> Doctors have recently shocked the nation by revealing their success in cloning, or twinning, a human IVF embryo. In Japan, an embryonic goat is coming to term in an artificial womb. You can be sure that the doctors are thinking about the possibilities for bringing human embryos to term without the need for a human womb. We have recently read that scientists are hard at work on a project designed to enable an aborted female fetus to function as an egg mother: the idea is to implant the fetal eggs in an adult woman who cannot produce eggs, enabling her to give birth to a child whose genetic mother will never have lived.

Id.

18. Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 198 n.42 (1986). Of course, adults who adopt a child are both 'matters of fact,' but I do not address who qualifies as an adoptive parent in this article.

19. *Id.* at 187. "The legal definition of 'mother' has traditionally carried an unshakeable presumption: She was the one from whose womb the child came." *Id.* (footnote omitted).

20. For discussions of the history of the presumption of legitimacy, see Joseph Cullen Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22 (1902-03) (bring your Latin dictionary); Note, *Presumption of Legitimacy of a Child Born in Wedlock*, 33 HARV. L. REV. 306 (1919-20). For a description of the historical purpose of the presumption, see *In re* Estate of Matthews, 47 N.E. 901 (N.Y. 1897).

21. Michael H. v. Gerald D., 491 U.S. 110, 125 (1989). For a later development that assigned responsibility for supporting illegitimate children to the putative fathers, see *infra* note 182.

22. *Id.* at 124-25.

23. *Id.* at 125.

The common law presumption of legitimacy was a default rule. Assuming the mother's prior marriage, her husband was her child's father unless someone came forward with extraordinary proof. Because marriage was a norm, the presumption of legitimacy became a norm as well, operating automatically to assign to particular adult males the responsibility for particular children.

B. The Tradition's Ebb

The modern presumption of legitimacy remains a default rule,[24] but for at least four reasons it is no longer a norm. First, of course, increasing numbers of parents do not marry, either by choice or because they are ineligible for marriage. Notwithstanding the greater effectiveness and availability of birth control methods, the percentage of births to unwed mothers in the United States has risen continuously since 1970, from 10.7% of all births then to 18.4% in 1980, 28% in 1990, and 33% in 1999.[25] Most of those women were probably heterosexual and eli-

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24. *See* JOHN HENRY WIGMORE, 9 EVIDENCE IN TRIALS AT COMMON LAW § 2527 (James H. Chadbourn ed., 1981) ("That a child born of a married woman during wedlock is presumed to be the child by her then husband is uniformly conceded. The only doubt has been whether and how far this presumption is conclusive; i.e., to what extent it is a fixed rule of substantive law defining the legal quality of legitimacy.").

Maine's version of the common law presumption of legitimacy is found in MAINE RULE OF EVIDENCE 302:

> Whenever it is established in an action that a child was born to or conceived by a woman while she was lawfully married, the party asserting the illegitimacy of the child has the burden of producing evidence and the burden of persuading the trier of fact beyond a reasonable doubt of such illegitimacy.

ME. R. EVID. 302. For a history of this rule in Maine, see *Denbow v. Harris*, 583 A.2d 205, 206-07 (Me. 1990). Maine's statutory presumption, based on "blood or tissue tests," is found in ME. REV. STAT. ANN. tit. 19-A, § 1561 (West 1998). *See also* UNIF. PARENTAGE ACT § 4, 9B U.L.A. 298-99 (1987).

25. National Vital Statistics Reports, Vol. 48, No. 16, Oct. 18, 2000:

Table 1. Number, rate, and percent of births to unmarried women and birth rate for married women: United States.

Year	Number of births to unmarried women	Percent of all births to unmarried women	Birth rate per 1,000 unmarried women 15-44	Birth rate per 1,000 married women 15-44
1999	1,304,594	33.0	43.9	87.3
1998	1,293,567	32.8	44.3	85.7
1997	1,257,444	32.4	44.0	84.3
1996	1,260,306	32.4	44.8	83.7
1995	1,253,976	32.2	45.1	83.7
1994	1,289,592	32.6	46.9	83.8
1993	1,240,172	31.0	45.3	86.8
1992	1,224,876	30.1	45.2	89.0
1991	1,213,769	29.5	45.2	89.9
1990	1,165,384	28.0	43.8	93.2
. . .				
1980	665,747	18.4	29.4	97.0
. . .				
1970	398,700	10.7	26.4	121.1
. . .				

Data compiled for 1999 are preliminary. Figures are based on weighted data rounded to the nearest individual.

gible for marriage, but not all. There has also been a substantial increase in the number of children being raised by people who are not allowed to marry. Commentators have observed a "lesbian baby boom,"[26] and it is estimated that "six to fourteen million children" are growing up in gay and lesbian homes across the nation.[27] There is little reason to expect births to unwed mothers to decrease, and every reason to expect that the liberty that their increasing visibility has bestowed on gay and lesbian couples will inspire their increasing pursuit of parenthood.[28] As these trends continue, the presumption's significance shrinks.

Contributing to that abatement is the fact that many people are not bothering with divorce before they cohabit and reproduce with subsequent partners. I lack empirical statistics to prove it, but I lack no confidence in the trend's existence, because in child support cases for newly-born children throughout the State of Maine, the parties are frequently required to notify the mother's long-disappeared husband of the theoretical interest the presumption of legitimacy assigns him in each case. This usually requires notice by publication, a tedious and expensive process the increasing necessity of which makes the trend unmistakable.[29] In these

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26. Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. OF GENDER & L. 175, 175 (1995); Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 147 (2000).

27. *Id.* at 175 n.2.

28. Lisa Pooley has stated:

> In the United States today most families no longer fit into the 'traditional' nuclear structure of father, mother, and their children. The increasing number of divorces is one reason for this change. Other reasons for the increase of 'nontraditional' families include the increase of heterosexual nonmarital cohabitation, the openness of same-sex couples, and the growing number of women who raise children alone, either by choice or default.

Lisa M. Pooley, Note, *Heterosexism and Children's Best Interests: Conflicting Concepts in* Nancy S. v. Michele G., 27 U.S.F. L. REV. 477, 478-79 (1993).

29. Statement to the Author from Maine Assistant Attorney General Jessica L. Maurer, Supervisor, Child Support Servs., Maine Dep't of Human Servs. (Nov. 22, 2000) (on file with the Author):

> In Maine, the legislature has recently created a Family Division of the District Court to deal with divorce and support cases expediently and informally. Despite these efforts, not all people turn to the courts to legally end their marital relationships. Instead, many simply move apart, form separate households and produce children with new partners, without ever having terminated their old marriages.
>
> Under Maine law, when a married woman gives birth to a child, the child's father is presumed to be the woman's husband—even if she hasn't seen him for ten years. He may have been serving in the French Foreign Legion since Michael Dukakis ran for President, but he's now the father of her new child. This creates problems for the actual biological father, who cannot voluntarily add his name to the birth record until a court removes the husband's name from the birth record. This means the biological father cannot establish any rights to the child voluntarily and [without] legal action.
>
> When a woman receives public assistance for the support of her child, the State usually files an action against the father to establish paternity and support for the child. Usually we pursue paternity cases under a statute that permits an expedited procedure for establishing support. [*See infra* note 186.] However, when it is alleged that the husband is not the biological father of the child, the expedited procedure is unavailable to us, even if the actual biological father is cooperative and wants to acknowledge paternity. Instead, we must proceed with a standard civil action for support and, if we cannot find the husband, we must serve him by publication.

> My Department's attempts to establish paternity and support have been increasingly frustrated by problems associated with these types of cases. This trend shows no sign of abating, and the frivolous duty of notice [to husbands] that the presumption of legitimacy impose[s] on us increasingly thwarts our efforts at efficient support collection. The decision of a husband and wife not to seek a divorce upon separation can create tremendous difficulty for an after-born child, the child's biological father, the State and the court system. As we cannot force people to get divorced, the only meaningful way to change the system is to remove the presumption of legitimacy.

The notice issue arises by dint of footnote in *Stanley v. Illinois*, 405 U.S. 645 (1972):

> Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases . . . provides for personal service, notice by certified mail, or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of "All whom it may Concern." Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.

Id. at 657 n.9.

I have sedulously researched the sociology literature in vain to find statistical proof of the phenomenon that Attorney Maurer and I have observed. There is no doubt that the divorce and remarriage rates have declined in recent years. The following is from the National Center for Health Statistics and appeared in Arthur J. Norton and Louisa F. Miller, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P-23-180, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE 1990's, 2 Tbl. A (1992):

Period	Divorce Rate*	Remarriage Rate**
1975-77	37	134
1978-80	40	134
1981-83	39	125
1984-86	38	115
1987-89	37	109
1990-92	37	103
1993-95	37	96

* Divorces per 1,000 married women, 15-44 years old.

** Remarriages per 1,000 widowed and divorced women, 15-44 years old.

Estimates for divorce and remarriages between 1990 and 1995 are based on provisional NCHS data through 1994, by the Joint Center for Housing Studies of Harvard University, GEORGE S. MASNICK, JOINT CENTER FOR HOUSING STUDIES OF HARV. UNIV., MARRIAGE, DIVORCE, REMARRIAGE AND HOUSEHOLD GROWTH IN THE U.S.: 1940-1995 4 (1996).

This trend has puzzled sociologists. One has commented:

> With no behavioral theory predicting a leveling of divorce, compositional explanations have predominated; some researchers have suggested it is too early to take the plateau seriously. Among the compositional explanations have been (1) the aging of baby boomers, which has increased the average duration of intact marriages; (2) the increase in the age at first marriage, which has lessened the number of very young brides and grooms; (3) a possible end to the rise in remarriages, which historically have had higher dissolution rates; and (4) the increase in cohabitation, which may have siphoned away some of the couples most likely to divorce.

Joshua R. Goldstein, *The Leveling of Divorce in the United States*, 36 DEMOGRAPHY 409, 409 (1999) (footnote omitted). Factors (3) and (4) fit what Ms. Maurer and I have observed.

cases the presumption works an obvious fiction while causing expense and delay that benefits no one. A rule of law that was originally intended to promote social harmony, preventing suits against husband and wife asserting that their children are illegitimate, now inhibits suits about child support that promote social justice. In its current form, the presumption of legitimacy seems decreasingly worthwhile.

A third, and especially fossilizing, factor is the scientific advances that have rendered paternal identification a virtual certainty. As one authority put it, "the degree to which genetic testing now can probe paternity may be sufficient to warrant qualitative changes in legal practice."[30] In fact, the reliability of genetic testing has provided the supreme courts of three states with reason to abolish the common law presumption entirely.[31]

A fourth—and for our purposes the most problematic—cause of the presumption's demise are the medical advances in conception technology that have created ambiguities in parenthood—like that between Crispina and Anna—which the presumption does not address.

III. TECHNOLOGICALLY-ASSISTED REPRODUCTION

The oldest reproduction technology, assisted insemination (AI),[32] is hardly a

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30. D.H. Kaye, *D.N.A. Paternity Probabilities*, 24 FAM. L.Q. 279, 303 (1991). *See also* Stitham v. Henderson, 2001 ME 52, ¶ 21, 786 A.2d 598, 604 (Saufley, J., concurring) ("Because testing is now sufficiently accurate, the presumption of paternity, a hurdle once very difficult to overcome, can now be swept aside by a simple test.").

31. The Massachusetts Supreme Judicial Court abandoned the presumption with these observations:

> In view of the gradual betterment of the illegitimate child's legal position, which weakens the purpose behind the presumption, coupled with the corresponding recognition of the interests of unwed putative fathers, we think that there is no longer any need for a presumption of legitimacy. The interests involved can be adequately protected by requiring that a putative father . . . be required to prove paternity by clear and convincing evidence.
>
> . . . .
>
> . . . The advances of modern science make determinations and exclusions of paternity much more accurate than was ever historically possible. In this context we think it preferable that a putative father . . . be able to produce the evidence he has on the issue of paternity. Placing a barrier between the plaintiff and the fact finder by requiring that the plaintiff first prove, beyond a reasonable doubt, [the] nonaccess, impotency, or scientific exclusion of the husband, is no longer warranted.

C.C. v. A.B., 550 N.E.2d 365, 370-71 (Mass. 1990) (footnote omitted). The Connecticut Supreme Court did the same in *Weidenbacher v. Duclos*, 661 A.2d 988, 998 (Conn. 1995) ("modern scientific tests can determine, with nearly perfect accuracy, who is the true biological father of a child"). The Iowa Supreme Court did likewise, adopting Justice Brennan's dissenting position in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), by holding that the state constitution forbids denying a putative father standing to establish his paternity of a child born to a woman married to another man. Callender v. Skiles, 591 N.W.2d 182, 190-91 (Iowa 1999) ("[S]cientific advancements have also made the identity of a biological parent a virtual certainty.").

In Maine, scientific testing that establishes a heavy likelihood or unlikelihood of paternity is admissible, irrespective of the common law presumption of legitimacy. ME. REV. STAT. ANN. tit. 19-A, §§ 1564(1)(A) and (1)(B); Stitham v. Henderson, 2001 ME 52, ¶ 21, 786 A.2d 598, 604. Absent such testing, however, the presumption of legitimacy controls. It is unusual that any such testing will have been done by the time of a child's birth, the point at which the assignment of parental responsibilities becomes crucial.

32. "The principles of artificial impregnation were known to the ancient Arabs, and they practiced it upon their horses. . . . In 1866, J. M. Sims performed the first successful artificial impregnation upon a woman in the United States." Note, *Artificial Insemination—Its Socio-Legal Aspects*, 33 MINN. L. REV. 145, 146 n.4 (1949).

technology at all, for it can be performed at home with a turkey baster.[33] The simple accessibility of this technique has rendered it an important alternative to adoption for single women and gay and lesbian couples who want to raise children.[34] Given recent increases in the number of single women and gay and lesbian couples seeking parenthood, AI would undoubtedly remain a conception method of choice among those populations[35] were it not for three difficulties. The first is that there may be no screening for communicable disease—especially AIDS—if AI is performed informally.[36] Current medical practice quarantines sperm for six months after its production, during which time the donor is twice tested for HIV.[37] But no such precautions will usually have occurred when AI is performed with kitchen utensils at home.[38] The risk of infection to the woman and her fetus might induce more prospective, alternative parents to visit medical clinics, were it not for a second problem: There has been a traditional resistance in the medical community to the use of AI for single women and lesbians.[39] And a third difficulty is that

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By 1949, artificial insemination could "make childbearing possible in more than 35% of the 3,000,000 American marriages now involuntarily barren." Comment, *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 YALE L.J. 457, 458 (1949).

33. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTION TECHNOLOGIES 8 (Princeton U. Press 1994).

34. Barbara Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 2-4 (1981).

35. "[A]n unknown amount of AI occurs outside doctors['] offices with privately procured sperm and self-administration via turkey basters or syringes. It has become an important avenue to pregnancy and child rearing for women who lack a male partner and wish to reproduce." ROBERTSON, *supra* note 33, at 8 (footnote omitted); *see also* ROYAL COMMISSION REPORT, *supra* note 2, at 458 ("One U.S. estimate suggests that 1000 to 3000 children are conceived by lesbians using [self-administered artificial insemination] each year, and it is generally agreed that the practice is increasing.").

36. "Because most sexually transmitted diseases can be transmitted in semen, it is essential to ensure that donors do not infect recipients. Precautions to prevent this occurring are now critical because HIV, the virus associated with AIDS, is transmitted in semen." ROYAL COMMISSION REPORT, *supra* note 2, at 448. Other diseases of identical concern are "cytomegalovirus, hepatitis B, herpes simplex, chlamydia, gonorrhea, syphilis, ureaplasma, mycoplasma, certain streptococcus strains, and trichomonas." *Id.*

For a grim illustration of this problem, see *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992). Judith Stiver, a traditional surrogate, contracted cytomegalovirus (a form of herpes) from the intended father's untested, unscreened semen. *Id.* at 263-64. The virus caused the child she bore nine months later to be microcephalic and mentally retarded. *Id.* at 263.

37. ROYAL COMMISSION REPORT, *supra* note 2, at 448; *see also* Anita M. Hodgson, *The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures*, 26 IND. L. REV. 357 (1993).

38. Professor Robertson expresses a similar concern in a different context: "Holding sperm donors responsible for the costs of rearing offspring would reduce the opportunities of unmarried women to obtain sperm from physicians or sperm banks, thus relegating them to turkey baster inseminations with sperm that has not been screened for infectious diseases." ROBERTSON, *supra* note 33, at 128.

39. *See* Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 30 S. CAL. REV. L. & WOMEN'S STUD. 173, 204, 214 (1996): ("[Artificial insemination by a donor] for single women remains extremely controversial. Some physicians, because of their own personal philosophies or religious beliefs, refuse to inseminate single women .... Single women are essentially in a 'catch-22.' They may turn to self-insemination due to the difficulty of finding a physician who will inseminate them. However, if they self-inseminate, the donor may have parental rights.").

there is little possibility of donor anonymity with self-help AI, which may be fine for gay parents but which could prove inimical to women who do not want interference from a father.[40]

A. Tracing the Genetic Tie: Donated Sperm and Eggs

Despite these difficulties, AI remains an important conception aid for all persons who are unable to conceive coitally,[41] for it circumvents straightforward fertility problems such as the incompatibility of a woman's cervical mucus with sperm, or a spinal cord injury that prevents a man's participation in intercourse.[42] In addition, AI is a remedy for some male infertility. For example, if the problem is a low sperm count, the parties may seek to "capacitate" the sperm—chemically enhancing the sperm cells' potentiality—before insemination.[43] Such AI processes

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Some discrimination is more perceived than real. Clinicians have occasionally encountered intended parents who reject the IVF children they brought into the world because the children are genetically unrelated, or only partially related, to them. This behavior is sometimes instinctual—an automatic disassociation with offspring that does not carry its parent's characteristics—and sometimes psychological. Many fertility clinics require that patients who seek to cure their infertility with donated sperm or embryos undergo counseling first, a screening procedure to eliminate those who would predictably reject unrelated offspring. Many single women, and some gay and lesbian couples, disdain this requirement as unfair because they cannot become parents without the third-party donation of some gamete. So some of them refuse counselling, thus rendering themselves ineligible for the services of such clinics. Statement by Gary L. Gross, Clinical Instructor, Dep't Obstetrics & Gynecology, Harv. Med. School (Nov. 29, 2000) (on file with the Author).

40. *See, e.g.*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App., 1986) (sperm donor declared father over objection of mother and her partner); *In re* Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. App. Div. 1994) (sperm donor allowed to pursue visitation over objection of mother and her partner). The Royal Canadian Commission found that "[t]he majority of women who chose [self-administered assisted insemination] used anonymous donors for fear of legal complications and from a desire to raise the child without the involvement of the donor." ROYAL COMMISSION REPORT, *supra* note 2, at 458 (footnote omitted); *see also* Harlow, *supra* note 39, at 214. *See also* Stitham v. Henderson, 2001 ME 52, ¶ 8, 786 A.2d 598, 601 ("The biological mother may not want the paternity of the biological father determined because she does not want him to establish a relationship with the child, or she does not want him to be allocated rights in the upbringing of the child.").

41. "Approximately 14 percent of [heterosexual] couples of reproductive age in the United States face fertility problems. Among the three million affected couples, a male factor is responsible for 35 percent of cases of infertility, a female factor for 55 percent. Five to ten percent of the cases involve unexplained infertility in which no cause can be identified." D. KELLY WIESBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 1210 (1998).

42. ROYAL COMMISSION REPORT, *supra* note 2, at 440, 439.

43. A word about terminology. The purpose of this article is not to educate the reader about the varieties of assisted reproduction techniques, or about the differences between them. Therefore, I use terms generically rather than technically. Thus I use the term IVF to refer to in vitro fertilization with embryo transfer (IVF/ET) and do not distinguish between IVF, gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT) and direct oocyte sperm transfer (DOST). ROYAL COMMISSION REPORT, *supra* note 2, at 509-10. Nor do I distinguish between a zygote (a fertilized egg), a blastocyst (a zygote after several days of cleavage but before implantation in the endometrium of the uterus), a pre-embryo (a term that appears in the legal literature and is probably a synonym for blastocyte) and an embryo (what a blastocyte becomes after implantation). *Id.* at 153-59; ROBERTSON, *supra* note 33, at 101. It is enough for my purposes that the reader understand that a variety of assisted reproduction techniques exists,

as this require sophisticated medical assistance, but regardless of their complexity all such AI procedures produce a child who is genetically related to both the husband or male partner (husband), whose sperm fertilized the egg (AIH), and the wife or female partner (wife), whose egg was fertilized. Alternatively, in the event of the male's total infertility or his risk of transmitting a genetic defect,[44] the parties may obtain sperm from a third person—a donor. A child conceived via AI with sperm from a donor (AID) will be the wife's genetic relation, but not the husband's. In the following charts, the shaded portions indicate the relationship of the child to the adults who intend to be the child's parents:

	Egg from W(ife)
sperm: H	Genetically-H&W
sperm: D	Genetically-W

With AIH and AID, fertilization occurs within the wife/partner's (wife's) uterus. In many cases, however, the egg and sperm are combined not within the uterus but in a laboratory—a process called in vitro fertilization (IVF)—and the fertilized egg is implanted in the wife after conception. If the wife provides the egg and the husband the sperm, the child will be the genetic offspring of both of them (the spouses). If the wife provides the egg but they use a donor's sperm, the child will be genetically related only to the wife. (Doing the converse—fertilizing a previously-donated egg with the husband's sperm—is not presently an option, for the reason that it is difficult to preserve unfertilized eggs for later use.[45]) If the spouses can produce neither sperm nor egg, they may purchase donated embryos, the product of third-party sperm and egg. This will complicate the genetic lineage of a child even further because a child from a donated embryo will not be genetically related to either of the spouses. If genes are the measure of parenthood, neither spouse will qualify.

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and that improvements in medical science will undoubtedly improve both the success rates of those techniques and their popularity. Thus the problem of identifying parents is with us to stay.

For more information about specific terms and techniques, *see* Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 U.C.L.A. L. REV. 1077 (1998).

44. *See* Karen M. Ginsberg, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823, 830 (1997). Ginsberg discusses a case in which a couple sued a sperm bank for having failed to screen donor sperm adequately for the cystic fibrosis gene. The intended parents, both of whom carried the gene, wound up with a child with cystic fibrosis. *Id.*

45. "Sperm cells take readily to freezing, slipping into cryogenic sleep and remaining viable for many years. Fertilized eggs—in the form of embryos—can be similarly preserved if water is first removed and replaced with an organic antifreeze that prevents the formation of cell-bursting ice crystals. Unfertilized eggs, however, do not fare so well: even when they're cryoprotected, their fragile membranes—or even worse, their chromosomes—are often damaged during freezing." Jeffrey Kluger, *Eggs on the Rocks*, TIME, Oct. 27, 1997 at 105. At the time that article was written, a new procedure to preserve eggs was "not yet ready to go mainstream" because it did "not match even the modest 25% birth rate achieved with frozen embryos." *Id.* at 106.

Were it possible to preserve eggs for later donation and IVF with the husband's sperm, the child's genetic lineage would derive from the husband but not the wife. This possibility appears in the chart in the text following note 47, *infra*, in the column headed "Egg from donor, gestation by W."

	Egg from W(ife)	Egg from donor
sperm: H	Genetically-H&W	Genetically-H*
sperm: D	Genetically-W	Genetically-neither (donated embryo)

*(problematic: see text)

B. The Biological Tie: Gestational Carriers and Surrogates

The foregoing assumes that the wife can carry a fetus to term. If the fetus is the product of the spouses' sperm and egg, the child will be not only genetically related to the spouses but also biologically (physiologically) related to the wife, for her pregnancy is the biological prerequisite to the child's birth.[46] Even if the fetus derives from a donated embryo, the wife will still be able to claim at least a biological relationship to the child. But it is also possible, in cases like Crispina's where a woman cannot carry a fetus to term, to implant the embryo in the uterus of a woman who can—a gestational carrier, like Anna.[47] The child the carrier bears will be neither the genetic nor the biological product of either spouse.

	Egg from W(ife) gestation by W	Egg from donor, gestation by W	Egg from W, gestation by carrier	Egg from donor, gestation by carrier
sperm: H	Genetically-H&W biologically-W	Genetically-H* biologically-W*	Genetically-H&W biologically-neither	Genetically-H biologically-neither
sperm: D	Genetically-W biologically-W	Genetically-neither biologically-W	Genetically-W biologically-neither	Genetically-neither biologically-neither

*(problematic: see text)

46. The husband will not be biologically related to the child because he did not engage in the male biological prerequisite to the child, intercourse. The fact of the husband's biological participation explains why there is no such thing as "surrogate intercourse"—impregnating a surrogate with the husband's sperm by intercourse while preserving the wife's claim to the child's motherhood. If a man and a woman both participate biologically—through intercourse—in creating a child, they are the parents, regardless of whether you call the man a donor or the woman a surrogate. In the sea of change that confronts us, this seems to be one immutable rule.

Because the husband's biological contribution is so brief, I decline to discuss it in the text hereafter.

47. Some authorities would refer to Anna as a "gestational surrogate." I prefer to avoid confusion, and reserve the term "surrogate" for a woman whose own egg is fertilized and who then gestates that embryo.

There is a final permutation. If the husband is fertile but the wife incapable both of producing eggs and of bearing children, the parties may engage a woman to bear for them a child conceived with the husband's sperm and that woman's own egg: a surrogate mother (sometimes called a traditional surrogate). The child will be genetically related to the husband, but neither genetically nor biologically related to the wife. Of course, if the surrogate is impregnated by the sperm from a donor, neither the husband nor the wife will be related to the child in either respect.

	Egg from W(ife) gestation by W	Egg from donor, gestation by W	Egg from W, gestation by carrier	Egg from donor, gestation by carrier	Egg from surrogate, gestation by surrogate
sperm: H	Genetically-H&W biologically-W	Genetically-H* biologically-W*	Genetically-H&W biologically-neither	Genetically-H biologically-neither	Genetically-H biologically-neither
sperm: D	Genetically-W biologically-W	Genetically-neither biologically-W	Genetically-W biologically-neither	Genetically-neither biologically-neither	Genetically-neither biologically-neither

*(problematic: see text)

This final chart illustrates how increasingly difficult it becomes to call the people who intend to produce a child its "parents" as their genetic and biological relationship to the child attenuates.[48] If both spouses donate genetic material and the wife gestates, it makes sense to consider them both parents—what difference does it make if the egg and the sperm met in the laboratory rather than in the uterus?[49] But if neither contributes in either manner, their "parenthood" becomes problematic. The presumptions of biology and legitimacy, which take the genetic and biological contributions of both parents as an indivisible given, offer virtually no guidance. It is plain that we need some new rules with which to fill this definitional vacuum.

IV. IDENTIFYING PARENTS OF TECHNOLOGICALLY-CONCEIVED CHILDREN

A. Factors to Consider

Medical technology has split the reproductive atom into two constituent parts: genetics and biology. In doing so, however, this technology has compelled recog-

48. The chart in the text does not exhaust the possibilities of technologically-assisted conception. It merely identifies those now in common use. What the future may bring is anyone's guess. *See* discussion *supra* note 16.

49. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 880 (2000).

nition of a third, as the recent California case, *In re Marriage of Buzzanca*,[50] starkly illustrates. The husband and the wife in that case had purchased an egg and sperm from anonymous donors and hired a gestational carrier to bear them the child.[51] During the carrier's pregnancy, the husband and the wife became estranged; after the child was born the wife assumed custody but the husband disavowed any parental responsibility and refused to pay child support.[52] He argued that he could not be declared the child's parent if he had contributed neither biologically nor genetically to the child's creation.[53]

The court held him responsible anyway, for the following reason:

> [T]here are times when *fatherhood* can be established by conduct apart from giving birth or being genetically related to a child. The typical example is when an infertile husband consents to allowing his wife to be artificially inseminated .... [T]he husband is the "lawful father" because he *consented* to the procreation of the child.[54]

The court concluded that "for all practical purposes John [the husband] caused Jaycee's conception every bit as much as if things had been done the old-fashioned way."[55] In fact, however, John's responsibility was based on a more obvious premise than if he done it the old-fashioned way. When a child is conceived by intercourse, there may be an ambiguity about the parents' intent to conceive, as distinguished, for example, from their pursuit of gratification.[56] No such ambiguity existed here: John simply intended the child to exist.

The decision to hold John responsible seems fair for two reasons. First, we want people to bear the consequences of their voluntary decisions.[57] Second, such a policy reflects our sense that, notwithstanding John Buzzanca's behavior, people who intend to make a baby are more likely to act in that child's best interest than are those who conceive accidentally or incidentally.[58] In that regard, procreative

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50. 72 Cal. Rptr. 280 (Cal. Ct. App. 1998). *Buzzanca* was the final chapter (so far) of a battle that caught the attention of many commentators when it first reached the California Court of Appeal *sub nom Jaycee B. v. Superior Court*, 49 Cal. Rptr. 2d 694 (Cal. Ct. App. 1996) (citation omitted).

51. *In re* Marriage of Buzzanca, 72 Cal. Rptr. at 282.

52. *Id.*

53. *Id.*

54. *Id.* The court reversed the trial judge's "extraordinary conclusion [that the child] had no lawful parents," which the judge reached because neither the husband nor the wife had contributed biologically or genetically to the child's creation. *Id.*

55. *Id.* at 291.

56. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 324 ("severing intention about procreation ... from other motivations").

57. "Our society generally favors the fulfillment of individual purposes and the amplification of individual choice. Developments that expand the arena of voluntary purposeful decision and action are strongly favored. Our political and cultural traditions emphasize individual liberty, particularly in central arenas of personal life, such as reproduction." *Id.* at 327 (footnote omitted).

58. *See* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 81 (1999) ("[T]here is no reason to think that adoptive parents pose more of a risk than biologically linked parents do. Indeed, the fact that adoptive parents have consciously chosen parenthood would seem more than enough to compensate for any difficulties that might be inherent in adoptive parenting."). The *Buzzanca* decision rested on an earlier California Supreme Court decision, *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), which had

intent seems a commendable factor for deciding who an AI or IVF child's parents should be.

If so, there may be three factors that can contribute to the identification of the parents of an assisted-reproduction child: genetics, biology, and intent.[59] To illustrate their interrelationship I refer again to the introductory problem of who among Crispina, Mark, and Anna should qualify as the parents of the child Anna would bear:

	Genetics	Biology	Intent
Anna (gestational carrier)		✓	
Mark (intended father/donor)	✓		✓
Crispina (intended mother/donor)	✓		✓

How you choose two parents from these three candidates depends on how you prioritize and combine the factors. On that issue there is a blizzard of disagreement:

- Some scholars take the position that all forms of surrogacy should be entirely banned or, in terms that I adopt in this article, that biology with or without genetics should beat intent with or without genetics—Anna is declared the mother. Others, however, take *Buzzanca* one step further and argue that procreative intent is all that matters—Crispina wins. Another argues that genetics should control—Crispina wins again. Still others argue that the child's best interests trump all three factors and that the child Anna would bear might wind up with three parents.

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relied heavily on the assumption that intent forecasts parental devotion: "The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child." *Id.* at 783 (quoting Stumpf, *supra* note 18, at 196).

59. *See* Jonathan B. Pitt, Note, *Fragmenting Procreation*, 108 YALE L.J. 1893, 1897 (1999); *see also* Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 273 (1993).

There is more to "fatherhood" in federal constitutional doctrine than genetics, biology and intent. There is also the father's social relationship with the child and with the mother. *See generally*, Lehr v. Robertson, 463 U.S. 248 (1983). Others distinguish between a natural parent and a "psychological" parent. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1973). But fatherhood in those contexts is not what concerns me here. Those factors involve the degree to which a male adult has an actual, social relationship with existing people. I am concerned only with the instantaneous allocation of responsibility upon birth. *See* discussion *infra* note 175 and text following.

One reason why I acknowledge that mine may be only a temporary solution to the problem I address is because one can never be sure whether another important factor will emerge later. *See* discussion *infra* notes 138-46 and accompanying text. One factor that I have intentionally omitted is marriage and its attendant presumption of legitimacy, which could render the gestational mother's husband the father. For further discussion of this issue, see *infra* note 232 and the text that follows.

- The famous *Baby M.* case took the view that surrogate motherhood amounts to baby-selling and that surrogate contracts are against public policy and unenforceable: genetics plus biology beat intent alone (which helps not at all to resolve Crispina's and Anna's dispute). But another court, unoffended by surrogacy, held that genetics plus intent beat biology alone (Crispina wins—the actual result in Crispina's and Anna's case), and yet another that genetics plus biology beat genetics plus intent.
- Fewer than half the states have statutes that address surrogacy, and there is no consistency among them. A proposed uniform statute attempts to reconcile the best interests of all of the adult parties with that of the child, but may be inadequate for the task.

Each of these approaches makes some sense, but many of them are as irreconcilable as they are sensible, and what my discussion for the next several pages unavoidably portrays is a dismaying theoretical standoff.

B. The Scholastic Theories

1. Intent Beats Genetics and Biology

Procreative intent is the guiding principle that many academics favor in this field of law. Here is an early statement of that principle:

> The fact that the initiating parents mentally conceived of the child and afforded it existence prior to the surrogate mother's involvement must be acknowledged along with the fact that the surrogate mother entered the arrangement as a third party, willing to assist the initial parents, and that her husband, if she has one, consented to the arrangement with the understanding that the child would not be his—either biologically, psychologically, or legally. Balancing risks and benefits, the initiating parents should be responsible for a child that no one wants, and they should be entitled to a child that everyone wants.[60]

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60. Stumpf, *supra* note 18, at 205, *see also* Shultz, *supra* note 56, at 323. According to Schultz:

> Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood. As with most arenas in which private ordering is encouraged, that rule ought not to be absolute. Rather, it should be a default rule, an enabling rule that allows intention to govern unless and until policy restrictions on particular types of private arrangements are articulated, justified and adopted. . . . Such intentions may, of course, be motivated by or aligned with biology or conventional social morality. But whether those factors converge or diverge, intentions should govern the legal assignment of parental rights and responsibilities.

Id. (footnote omitted). *See also* John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 386 (1991). Hill states the following:

> Since the legitimate exercise of the right of procreation would accord parental status to the possessor of the right, those to whom the right of procreation does not apply would not have a cognizable claim to parent the child. Thus, where a conflict develops, as in the *Baby M.* case, between claims based upon intentionality and those predicated upon biology, the intentional parents would take legal priority as the parents of the child.

Id.; see also Lee M. Silver & Susan Remis Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 HARV. J. L. & TECH. 593, 618 (1998):

There is as satisfying a quality to this approach as there is to the *Buzzanca* decision: You get what you ask for and agree to. Furthermore, its advocates claim, this approach fits neatly into existing contract law, which already addresses the implementation and enforcement of intent. No legal invention is required. Notice how handily this rule makes Charles and David the parents of Edward and declares Crispina a mother. Finally, it provides women with freedom to bargain about things that only they can do, which is a substantial improvement over the archaic notion "that while men get paid for their efforts, skills and services, women, being women . . . are too delicate, too pure, to be tainted by filthy lucre."[61]

But is all that so satisfying? Does the law of the marketplace work in this context? Given that the surrogate is expected to give up the child she bore, one might pause over the Supreme Court's description of pregnancy: "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . [T]hese sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love . . . . Her suffering is . . . intimate and personal . . . ."[62] Contrast that description with this, a consequence of procreative-intent-based parenthood:

> [T]he surrogate's claims for legal priority resulting from the harms of relinquishment [of the child she bore] must be evaluated in the context of her earlier contractual agreement to relinquish the child. Parties to contracts often regret having entered into enforceable agreements. In some cases, they may be disadvantaged greatly by the agreement; but as long as the agreement is entered into voluntarily, the argument that the surrogate now regrets having made this choice lacks the moral force it otherwise might have.[63]

> [I]n the absence of a prior written agreement between the parties, a court should apply a different standard to determine parental rights and obligations based on whether a child has already been born, whether the embryo is created and exists outside a human body, or whether a pregnancy is underway.
>
> In the case of a living child, a court should base parental responsibility on a consideration of the parties' intent at the time they consented to the reproductive procedure that gave rise to the child's birth.

Id. *See also* Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 U.C.L.A. WOMEN'S L.J. 329, 381 (1995). King offers the following:

> Parenthood should be assigned to the intentional parents of a child produced through collaborative reproduction. Intentional parents are those individuals who plan to raise a child and then orchestrate a collaborative reproductive effort that results in the birth of this planned-for child. The concept requires first distinguishing the previously linked ideas of biology and procreation. This distinction suggests that intended parents have a recognized claim to procreate. Consequently, their claims to parental rights can "trump" those of biological parents, where these two claims conflict.

Id. (footnotes omitted).

61. Schultz, *supra* note 56, at 380. Schultz criticizes the *Baby M.* decision for its ironical attempt to prevent women's exploitation: By banning surrogacy for hire, the court redoubled "women's inability to get adequate, or any, monetary compensation for the tasks and roles they solely or primarily perform. . . ." *Id.*

62. Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).

63. Hill, *supra* note 60, at 407 (footnotes omitted); *see also* Robertson, *supra* note 33, at 131 ("[I]t is not obvious that the surrogate's disappointment or loss at having to relinquish the child as promised should be privileged over the loss which the couple will feel if she now insists on rearing.") (footnote omitted).

The harsh rectitude of that policy seems as alien to the "intimate and personal" nature of motherhood as the Bauhaus style does to Monet's.

There are at least four reasons why this is so. First, forcing a woman to abandon the child she bore is at least unnatural and at most horrifying. We balk at anything that jeopardizes the mother-infant relationship because we expect a baby to be precious to its birth mother. We honor that expectation in the law of adoption, which allows the mother a period of time after her child's birth to rescind her decision to place the child elsewhere.[64] To argue that a woman must give up her child if she signed a surrogacy contract, but need not do so if she signed an adoption agreement, seems a distinction without any difference.

Second, we are disquieted by the fact that applying contract law to motherhood makes pregnancy seem fungible, like any commodity for which a price can be set.[65] Yet we know that it is not; we esteem motherhood because its essential quality—a weaving of affection, nurturing, altruism and protection—is singular and invaluable. Motherhood lies at the core of humanness: It exemplifies our highest qualities, and helps define humanity. Setting a price on it diminishes it. Setting its price cheapens our view of ourselves.[66]

Similarly, marketing pregnancy makes babies seem fungible as well, in violation of our fundamental instincts to the contrary, as well as of our historical antipathy to baby-selling.[67] While there may be reasons to call that hostility archaic,[68] it

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64. *See* discussion *infra* note 239 and text following.

65. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1880-81 (1987).

> [M]arket rhetoric conceives of bodily integrity as a fungible object. A fungible object is replaceable with money or other objects; in fact, possessing a fungible object is the same as possessing money. A fungible object can pass in and out of the person's possession without effect on the person as long as its market equivalent is given in exchange. To speak of personal attributes as fungible objects—alienable goods—is intuitively wrong. . . . Bodily integrity is an attribute and not an object. . . .

Id.

66. *Id.* at 1884-85.

67. FIELD, *supra* note 4, at 17 ("Today, a parent's surrender of a child for a fee—babyselling—is a crime in all states. In addition, many states have 'baby broker acts,' which limit or prohibit compensation of intermediaries in connection with the transfer of a child.") (footnote omitted). Maine's anti-baby-selling statute is 22 M.R.S.A. § 8204(3): "No individual who places or assists in placing a child for adoption shall charge a fee which represents more than the reasonable costs of the services provided. Violation of this subsection shall be a Class D crime." ME. REV. STAT. ANN. tit. 22, § 8204(3) (West 2000).

68. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 345-6 (1978):

> The emphasis placed by critics on the social costs of a free market in babies blurs what would probably be the greatest long-run effect of legalizing the baby market: inducing women who have unintentionally become pregnant to put up the child for adoption rather than raise it themselves or have an abortion. Some of the moral outrage directed against the idea of 'trafficking' in babies bespeaks a failure to consider the implications of contemporary moral standards. At a time when illegitimacy was heavily stigmatized and abortion was illegal, to permit the sale of babies would have opened a breach in an otherwise solid wall of social disapproval of procreative activity outside of marriage. At the same time, the stigma of illegitimacy, coupled with the illegality of abortion, assured a reasonable flow of babies to the adoption market. Now that the stigma has diminished and abortion has become a constitutional right, not only has the flow of babies to the (lawful) adoption market contracted but the practical alternatives to selling an unwanted baby have increasingly become either to retain it and raise it as an illegitimate child, ordinarily with no father present, or to have an abortion. What social purposes are served by encouraging these alternatives to baby sale?

is part of our cultural bedrock, and serves as the foundation for the nationwide doctrine that renders private contracts establishing children's legal status per se unenforceable.[69] If you pay a surrogate money to gestate and hand over a child that is half hers, you are paying for her parental interest in the child, as if it were mere goods in a marketplace.[70] Appropriately, our mind's eye turns to an image of human auctions.[71] We wonder whether we have wandered onto some ominous slippery slope.

Finally, we realize that contract theory rests on the same, careful logic that has proved such a misleading gauge of social justice in the past: *Plessy v. Ferguson*[72] was nothing if not logical. Likewise, the sweet Euclidean precision of the Restatement (Second) of Contracts may beguile us into ignoring the following possibility:

> [A] world in which female sexual and reproductive services are freely traded on markets would legitimate and reinforce a pervasive form of inequality—one that sees the social role of women as that of breeders, and that uses that role to create second-class citizenship. Surrogacy arrangements, if widespread, could affect attitudes, on the part of both men and women, about appropriate gender roles.[73]

They could, but would they? Nobody knows, so the debate about whether to legitimize surrogacy through the law of the marketplace, or to ban it for its potential toxicity,[74] will remain unresolved for what may be years to come.

See also BARTHOLET, *supra* note 58, at 74.

> Judged in terms of the very values it purports to serve, the [public adoption] screening system fails. Together with the rule against baby-buying, parental screening is supposed to ensure that children are assigned not to the highest bidder but to those deemed most fit to parent. The fact that money enables those deemed least fit to buy their way [by private adoption] to the children who are most in demand makes a farce of the entire system.

Id.; *see also* discussion *infra* in text following note 210.

69. Garrison, *supra* note 49, at 861-62.

70. *See In re* Baby M., 537 A.2d 1227 (N.J. 1988). Elizabeth Stern feared the medical consequences of pregnancy, but her husband William wanted to continue his bloodline because most of his family had died in the Holocaust. *Id.* at 1235. William entered into a surrogacy contract with Mary Beth Whitehead under which she would undergo AI and become pregnant by his sperm, bear a child, relinquish her parental rights to the child, and receive $10,000. *Id.* at 1236. After Baby M. was born, however, Whitehead decided she wanted to void the contract and keep the child. *Id.* at 1236-37. This precipitated a years-long legal battle in which the New Jersey Supreme Court declared surrogacy contracts void as against public policy:

> Mr. Stern knew he was paying for the adoption of a child; Mrs. Whitehead knew she was accepting money so that a child might be adopted; the Infertility Center knew that it was being paid for assisting in the adoption of a child. The actions of all three worked to frustrate the goals of the [adoption] statute. It strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money.

Id. at 1241.

71. "[W]hile surrogacy is certainly not the same thing as slavery, American slavery had the effect of causing black women to become surrogate mothers on behalf of slave owners.... Slave owners not only had ownership over the slaves but owned their children too, and could buy and sell them to third parties without regard to the wishes of the natural mother." Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 140 (1990).

72. 163 U.S. 537 (1896).

73. Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 47 (1992).

74. In the terms I employ in this article, genetics plus biology beat intent.

2. *Genetics Beats Intent and Biology*

An alternative approach projects geneology over procreative intent and biological contribution.[75] Because the surrogate is genetically related to the child she bears, her parental interest is as inviolate as if she had conceived coitally, irrespective of the preferences of the intended parents. On the other hand, if she is merely a gestational carrier, the woman whose egg produced the child is the mother. Intent is immaterial.

This approach resolves Crispina's dispute with Anna by making Crispina the mother. On the other hand, had Anna provided the egg—had she been a surrogate—she would have been the mother. In either circumstance, if the person this theory declares to be the mother wants to give up the child, she must place it for adoption. This improves our traction down that slippery slope, because we are no longer asking a mother to sell her parental interest in a child.[76] Furthermore, it advantageously reflects age-old convention:

> The blood bond between parent and child has achieved both historical and mythological significance in every culture. This connection is a manifestation of both the act of creating the child and the ongoing similarity between parent and child. . . . [I]t is only natural that our sublime and complex feelings regarding this issue reflect precisely the sentiment that law should preserve as a family unit that which nature has rendered genetically similar.[77]

But the rule's simplicity limits its usefulness, since the formula does not work for a woman who gestates a child from a donor egg. So if a woman becomes pregnant from an anonymous donor embryo that she herself has purchased, she could not be the mother even if she did it to obtain a child of her own. And if Crispina had bought an embryo for Anna's gestation, neither of them would be the mother. That does not seem fair, so for this rule to work in all circumstances it would have to except the circumstance of anonymous third-party donors and acknowledge that intent should then control genetics. In the simplest formulation of this rule, the exception would apply for men as well: The man who donates the sperm becomes the father, unless another man intends to parent the child. But by

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75. Jeffrey M. Place, Recent Developments, 17 HARV. J.L. & PUB. POL'Y. 896, 913 (1994) (footnotes omitted).

> Courts should make genetics the primary determinant of maternal rights. Such a determinant would provide the stability of a clear definition, while also balancing the considerations that are necessary when comparing surrogate motherhood with surrogate gestation. Furthermore, the genetic determinant: (1) separates contract principles from the allocation of family relationships, (2) recognizes the unique contribution of a genetic mother, (3) defers to the most important connection between mothers and children, (4) avoids the possible discriminatory results or oppressive application found in intent-based determination, (5) promotes the best interest of the child, and (6) conforms with current social understandings of parenthood.

Id.

76. "If the genetic mother is the legal mother, surrogate gestation cannot involve baby-selling. The [genetic] mother cannot buy what is already hers. By comparison, in surrogate mother cases, the surrogate mother would be recognized as the mother of the child. Absent legislative action, adoption would be necessary for the intended mother to become the legal mother of the child." *Id.* at 914 (footnotes omitted); *see also* Garrison, *supra* note 49, at 898 (If the "surrogate" mother is "the child's genetic and gestational parent . . . the surrogate is the child's legal mother unless and until she transfers her parental rights pursuant to state adoption law.").

77. Hill, *supra* note 60, at 389-90.

then the breadth of the exceptions has consumed the rule, which becomes: Genetics should control intent, unless intent should control genetics. We already knew that.

3. Biology Beats Genetics Plus Intent

Why not simplify everything by saying that "[a]ny pregnant woman is the mother of the child she bears"?[78] Does it not make sense to call "[t]he fetus . . . part of the woman's body, regardless of the source of the egg and sperm"?[79] If so, then "[m]otherhood can remain obvious. If a woman is carrying a baby, then it is her baby and she is its mother."[80] Anna wins every time.

If we say that, we mandate the intended mother's adoption of the birth mother's parental interest in every surrogacy and carrier case. To be consistently obvious, the argument goes, we must declare that the birth mother's husband is the father or in the unwed alternative the man whose sperm fertilized the egg.[81] So, (1) if Anna is married, her husband becomes the father; (2) if she is not married, Mark becomes the father; (3) if she is not married and Mark is not a donor, the donor is the father. In the cases of (1) and (3) Mark would have to adopt to become the father. The benefit of this approach is not only that it is simple but also that it reinforces other societal values: the prohibition against baby selling and the parental quality-control that adoption fosters.[82]

This approach preempts the whole debate, of course. If the mother is the gestator and the father either the husband or the sperm donor and we re-identify parents only through adoption, I can end this article here. But life is more complicated than that. We legitimize sperm banks because we are willing to allow donors not to be fathers.[83] We consider legitimizing surrogacy and gestational carrying in part because we have outgrown the rigid, social traditions that tethered women to specific familial roles before contraceptives provided them with reproductive choice. Moreover, we suspect that gestational freedom may, in fact, be a natural, evolutionary consequence of women's reproductive choice, and we fear that restricting women's gestational freedom is socially atavistic. Furthermore, we recognize that the presumption of legitimacy that assigns fatherhood to the birth mother's husband is archaic. And finally, for reasons that I explain below, if we are honest with

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78. BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD—IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 238 (Norton 1989).

79. *Id.*

80. *Id.* This is in fact the law in the United Kingdom, Germany, Switzerland, Bulgaria and South Africa. R. Alta Charo, *Fifteenth Anniversary Celebration: And Baby Makes Three—Or Four, Or Five, Or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 250 (2000).

81. ROTHMAN, *supra* note 78, at 238. Rothman admits that "[t]hat is not a perfect solution to the troubling question of fatherhood. . . . [But w]e have said that in our society husbands and wives, mothers and fathers, and babies are not for sale. Nothing in the new procreative technology need change that." *Id.*

82. *See id.* at 239.

83. *See* UNIFORM PARENTAGE ACT § 5(b), 9B U.L.A. 301 (1973) ("The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.") [hereinafter UPA-1973]; The UNIF. PARENTAGE ACT § 702, U.L.A. (Draft of October 20, 2000) ("A [sperm] donor is not a parent of a child conceived by means of assisted reproduction.") [hereinafter UPA-2000].

ourselves we will acknowledge that we tolerate baby selling.[84] To declare that biology beats all other considerations is to deny the legitimacy of this entire debate and to suggest ingenuously that, for the first time in human social history, there exists a simple solution to a complex problem.

4. Biology and Genetics Beat Intent (Sometimes)

Professor Marsha Garrison argues that we should use existing family law to resolve these problems to the extent that it reasonably applies.[85] The ordinary principles of family law that we employ every day of the week are long established and broadly accepted. Using them as a guide enables us to avoid some of the theoretical gridlock that I mentioned earlier.[86]

This approach, Garrison argues, neatly solves the motherhood problem whenever a surrogate is involved: The child is half the surrogate's, so to relinquish her maternal right she must place the child for adoption.[87] And because it does not matter whether the sperm and egg met in a petri dish or in a uterus, the father under such circumstances is determined by the laws of paternity just as if the child had been conceived coitally.[88] So Edward's parents are Mary and Charles or David, depending on whose sperm impregnated her. Biology plus genetics beat intent. Extant principles of family law also resolve the dispute between Crispina and Anna, because to the extent that it can be analogized to the problem of a gestational

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84. *See infra* text following note 212.

85. Garrison, *supra* note 49, at 882.

86. *Id.* at 874-75.

> [T]he New Jersey Supreme Court approached the [*Baby M.*] case from the perspective of existing law, which forbids baby sales. If a contract to sell a baby is unenforceable, the court reasoned, why should it matter that the baby was conceived through artificial insemination? . . . Because the court found no essential difference between the two types of transactions, it concluded that the contract at issue in *Baby M.* was invalid.
>
> [A]nother state court, analyzing the legality of a surrogacy agreement under its baby-selling laws, determined that surrogacy did not offend the baby-selling ban, both because the practice was not within the contemplation of the legislature at the time the statute was enacted and because, in its view, the sole purpose of the ban was to "keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child."
>
> [T]he process engaged in by judges . . . turns on the central purpose of a specific legislative enactment and offers the opportunity for close case comparisons instead of broad, theoretical disagreement. . . .
>
> [In comparison, t]he competing claims that surrogacy contract enforcement is demeaning to women and that surrogacy contract nonenforcement is demeaning to women represent broad value assertions rather than statements of fact. Such claims cannot be subjected to empirical analysis, nor can disagreements about them be resolved or even narrowed.

Id. (footnotes omitted).

87. *Id.* at 898.

88. *Id.*

> [I]f the surrogate mother is unmarried or state law permits an unmarried putative father to challenge the paternity of the mother's husband, the sperm donor should be able to establish his parental rights; but if the mother is married and state paternity law denies a putative father standing to challenge her husband's paternity, he should not.

Id. (footnote omitted).

carrier, current family law seems to favor genetics plus intent over biology: Crispina wins.[89]

In the terms I have employed in this Article those two results are inconsistent, of course, but under Garrison's theory it makes no difference, because to the extent that we ever even considered that inconsistency we accepted it a long time ago and we are use to it. So far, so good—and I will rely on this theme later in the Article.[90] But Garrison is less discriminating about the rules she wants us to rely on than I would like: One of the rules, the presumption of legitimacy, is too long in the tooth for our continued confidence[91] while another, the best-interest-of-the-child rule, may be too hollow for it.[92] Furthermore, Garrison cannot stretch any current rule of family law to fit the *Buzzanca* problem—identifying the parents of a child conceived from a donated embryo and gestated by a carrier. (Should intent beat biology?)[93] Nor does she offer a solution to the question that *Buzzanca* left unanswered: Which of the three candidates for parenthood—the intended father, the intended mother, and the gestational carrier—all of whom participated in creating the child but were genetically unrelated to the child, should have won if the carrier had asserted her right to parenthood? (Should biology beat intent?)[94] If we cannot answer those questions, we are still mired in gridlock.

5. The Best Interest of the Child Controls: The Child May Get Two Mothers

A couple of recent articles propose that it makes little sense to try to prioritize the three parenting factors because none is an accurate predictor of what counts the most: What is best for the child?[95] Instead, whenever there is a conflict between two or more parental candidates, the courts should resolve the problem by considering the child's best interest. "Why not give these children a break?" one scholar asks.[96] "Once a parent enters into a child's life, whether by virtue of genes, gestation, or declaration, there is an unbreakable bond of psychology and history between the two. . . . Surely we can be creative enough to create a new category, somewhere between custodial parent and legal stranger, that captures these relationships."[97] Another scholar argues, "[t]his may result in more than one legal mother raising a child, if such a resolution is in a child's best interests. . . . [W]hen a child's well-being appears to be in conflict with the interests of one or more maternal claimants, it is the welfare of the child that controls."[98] So if both Crispina and Anna have something valuable to offer the child, a judge might award "physi-

89. *See id.* at 912, 913.
90. *See infra* text accompanying note 207.
91. *See supra* text following note 24.
92. *See infra* text following note 173.
93. Garrison, *supra* note 49, at 919-20. I leave genetics out of the equation because none of the three principals was genetically related to the child.
94. *See* Pitt, *supra* note 59, at 1898.
95. *See, e.g.*, Hurwitz, *supra* note 8; *see also* Charo, note 81, at 250.
96. Charo, *supra* note 81.
97. *Id.* at 252-53.
98. Hurwitz, *supra* note 8, at 130-31.

cal custody to one and visitation rights to another, or shared custody to both women,"[99] or something else.

There is a refreshing bravura to this approach: We are playing a new game, so does it not make sense to change the rules? Of course it does, and one can only hope that state appellate courts will overlook the political volatility of such recommendations as these and permit trial courts to address children's interests with the new social syntax. Notwithstanding that, however, neither author bells the particular cat that is pestering me, for neither offers a quick rule for identifying parents upon a child's birth. Assuming that it may be in a particular child's interest to have two mothers and a father, from whom does the child inherit if all three adults die in a single accident two days after the child's birth? We cannot wait for courts to decide what is best for the child in every particular case in which the adults might disagree at some point during the child's minority; we need a rule that establishes responsibility from the beginning of the child's life.[100]

C. The Judicial Theories

As much disagreement as may exist in the academic world, things in the judicial arena are hardly better. Depending upon venue, the rules change, with at least as great a variety as will be found in the law journals. Part of that variety is due to fundamental disagreement about policy, but part of it is also due to the judges' inevitable sensitivity to the factual harmonics of each case, as a brief tour of recent caselaw will show.

1. Genetics and Biology Beat Genetics and Intent

The most common judicial response to surrogacy is to hold that the surrogate is the mother and the donor the father. This was the result in *In re Baby M.*,[101] from the New Jersey Supreme Court in 1988, as well as in subsequent cases from the Connecticut Supreme Court,[102] the Massachusetts Supreme Court,[103] a California Court of Appeals,[104] and an Ohio Court of Appeals.[105] In each of those cases, the wife was infertile, the husband the sperm donor, and the birth mother a true surrogate. Each case held that the surrogate, being genetically and biologi-

99. *Id.* at 175; *see also* Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 WAYNE L. REV. 1227, 1258 (1994): "This is a good approach which preserves the child's best interests. Although the gestational [carrier] may not be determined to be a parent, at the expense of the genetic mother, she may still have court-ordered visitation, if the court finds this to be in the child's best interests."

100. If the American Law Institute's proposal to award de facto parents parental responsibilities catches on, it will reinforce the proposal that parents of AI and IVF children be determined by the best interest standard, for each proposal considers adult rights and responsibilities for the child based on the existing social interrelationship, and irrespective of genetic or biological ties. *See* THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Tent. Draft No. 3, Part I, Mar. 20, 1998) §§ 2.03 (1)(b), 2.21 [hereinafter PRINCIPLES OF FAMILY DISSOLUTION]. However, the ALI's proposal does not address the problem that troubles me, because it deals only with family *dissolution*.

101. 537 A.2d 1227 (N.J. 1988); *see also* discussion *supra* at note 70.

102. *See* Doe v. Doe, 710 A.2d 1297 (Conn. 1998).

103. *See* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998).

104. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 4th 1994).

105. *See* Seymour v. Stotski, 611 N.E.2d 454 (Ohio Ct. App. 1992).

cally related to the child she bore, was the legal mother, notwithstanding the genetic contribution of the husband and the combined intent of the husband and the wife. In the following charts, the bold and capitalized type indicates the declared parent:

	Genetics	Biology	Intent
SURROGATE	✓	✓	
INTENDED FATHER/DONOR	✓		✓
Intended mother			✓

Each of these decisions employs the adoption default rule, which provides that, absent specific legislation about the method of assisted reproduction used, the courts are bound to resort to the nearest statutory analog, which is adoption law.[106] In effect, each decision treats the child conceived by artificial insemination as if it had been conceived by natural insemination: The father and mother were the same people as they would have been had they conceived coitally. Thus the wife—the intended mother—could not be the legal mother unless she had cut off the birth mother's parental rights through adoption.

This rule is easy and obvious. In fact, it is so obvious that it may foretell a nationwide dwindling of true surrogacy arrangements in favor of gestational carrier agreements, which are harder to analogize to adoption and therefore more likely to survive the judicial crucible. That is precisely the problem with the *Baby M.* rule: It derives its strength from analogy to existing principles of law rather than from any internal quality of flexibility. As was true with Professor Garrison's approach to these issues, existing principles do not help much when the facts escape their gravitational field.

2. *Genetics and Biology Beat Intent*

An Ohio Court of Appeals illustrated that limitation in a 1992 decision about an infertile husband and wife who had employed a surrogate to produce them a child using a donor's sperm.[107] When the husband died, the wife sought a declaration that she was the mother as against the surrogate.[108] But the court favored the surrogate because the wife was not genetically related to the child and she had not been declared an adoptive parent.[109] Adoption played a role in this case, and it could have been the exclusive basis for the decision, but the court was not satisfied to rely on that ground alone. This may be because if the husband had sur-

106. *See* Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 4th 1998):

> The legal paradigm adopted by the trial court, and now urged upon us by John, is one where all forms of artificial reproduction in which intended parents have no biological relationship with the child result in legal parentlessness. It means that, absent adoption, such children will be dependents of the state. One might describe this paradigm as the "adoption default" model: The idea is that by not specifically addressing some permutation of artificial reproduction, the Legislature has, in effect, set the default switch on adoption.

107. Seymour v. Stotski, 611 N.E.2d 454 (Ohio Ct. App. 1992).

108. *Id.* at 455.

109. *Id.* at 458.

vived, he would have had a stronger claim to paternity against the sperm donor than the wife had to maternity against the surrogate. Because neither man had participated biologically in the child's development, the contest between them (if any) would have been between the donor's genetics and the husband's intent—a close call.[110] In comparison, the surrogate could claim biological and genetic contribution, whereas the wife could claim only intent—not a close call after *Baby M.* The husband and the wife had made precisely the same contribution to the project, and neither had attempted to adopt, but the husband's claim to parenthood nevertheless seemed stronger than the wife's. Perhaps because of that imbalance, the court realized that adoption was a red herring, and bolstered its decision against the wife with reference to the added factor of genetics.[111]

	Genetics	Biology	Intent
SURROGATE	✓	✓	
INTENDED FATHER (dec'd)			✓
Intended mother			✓

The adoption default rule did not work as well when the facts bore a third party sperm donor as it had in the *Baby M.* case.

3. Genetics and Intent Beat Biology

The only surrogacy case to have reached the California Supreme Court was *Johnson v. Calvert*,[112] which was in fact Crispina's and Anna's case. At issue was the parental status of Anna, the gestational carrier. The court knew of *Baby M.*, of course, but ignored it because Anna was a gestational carrier rather than a surrogate, so the adoption model upon which *Baby M.* was based did not apply.[113] The court deemed Crispina's genetic contribution the qualitative equivalent of Anna's biological contribution, and broke the "tie" by preferring Crispina because Crispina's intent to procreate tipped the scales in her favor.[114] The court relied heavily on the academic literature favoring intent-based parenthood in deciding that Crispina's procreative goal was an adequately significant factor upon which to decide the case.[115]

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110. The court did not disclose whether or not there was a statute insulating a sperm donor from parental responsibility.

111. Seymour v. Stotski, 611 N.E.2d at 458.

112. 851 P.2d 776 (Cal. 1993).

113. *Id.* at 784.

> Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. . . . Anna was not the genetic mother of the child. The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child.

Id.

114. In an odd twist, a New York court used the *Johnson* formula to decide a case in which a wife gestated a child from her husband's sperm and a donated egg. During their divorce, the husband wanted the court to declare the wife not the child's mother, in order to exclude her from any parental rights. The court ruled, in effect, that the wife's intent plus biological contribution equaled the husband's intent plus genetic contribution, so she had as much right to be called a parent as he did. McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).

115. *See* Johnson v. Calvert, 851 P.2d at 782.

	Genetics	Biology	Intent
Gestational carrier		✓	
INTENDED FATHER/DONOR	✓		✓
INTENDED MOTHER/DONOR	✓		✓

A peculiar application of the same rule appeared in the recent New York case, *Perry-Rogers v. Fasano*.[116] To improve her opportunity for pregnancy, Mrs. Fasano had received a simultaneous uterine transfer of multiple embryos.[117] The embryos were supposed to have been the products of her eggs and her husband's sperm, but the clinicians also mistakenly implanted some embryos produced by a couple named Rogers. Within weeks thereafter the clinic notified both couples that Mrs. Fasano might be the gestational carrier for the Rogers's child, and that turned out to be true: She gave birth to twins, one of them a white child who was the Fasanos' genetic offspring, and one a black child whose DNA testing proved him to be the Rogers's.[118] It took the Fasanos about four months after his birth to turn the black child over to the Rogers, by which time the Fasanos claimed to have developed a bond with him.[119] The Rogers met the Fasanos' demand for visitation with a lawsuit.[120]

The New York court acknowledged the importance of the three factors *Johnson* had considered, the Rogers's intent and genetic contribution and Mrs. Fasano's biological role, and in denying the Fasanos contact with the child it reached the same result as had *Johnson*.[121] But the New York court refused to swallow *Johnson* whole. Instead, it likened the facts to a case of new-borns mistakenly switched at the hospital, declared it the Fasanos' responsibility to have corrected the error as soon as they had discovered it, and chastised them for not having delivered the child to the Rogers immediately after his birth and "before the development of a parental relationship."[122] Having forestalled propriety for four months, the court held, the Fasanos were estopped from "claim[ing] the status of parents, entitled to

116. 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

117. *Id.* at 21; *see also* ROYAL COMMISSION REPORT, *supra* note 2, at 527:

> Among the most serious risks of IVF are those associated with multiple pregnancy, a risk that is also associated with the use of the ovulation drugs, which are often used in conjunction with IVF .... (A)bout 30 percent of IVF deliveries, 24 percent of GIFT deliveries, and 23 percent of ZIFT deliveries are multiple, compared to a rate in the general population of about 1 percent.

See also Pam Belluck, *Heartache Frequently Visits Parents With Multiple Births*, N.Y. TIMES, Jan. 3, 1998, at A1.

118. Perry-Rogers v. Fasano, 715 N.Y.S.2d at 21. Something similar occurred several years ago in Holland: During an IVF procedure the technician used a pipette, inadequately cleaned after its previous use, to transfer sperm to a petri dish for the conception of the mother's eggs. The twins later born to the mother had different fathers, one white and the other black. Kenneth J. Ryan, M.D., *National and International Responses to Ethical Issues in Assisted Reproductive Technologies*, ASSISTED REPROD. REV. 181, 184 (1996).

119. Perry-Rogers v. Fasano, 715 N.Y.S.2d at 26.

120. *Id.* at 22.

121. *Id.* at 25.

122. *Id.*

seek an award of visitation."[123] That, of course, was a lose-lose formula for the Fasanos: If they had handed the child over quickly to avoid estoppel, there would have been little "development of a parental relationship" for them to claim and little opportunity for them to avoid the same result. The broad consequence of the decision was to prevent anyone in the Fasanos' position from ever winning parental rights. But the court sidestepped that issue, ruling instead that genetics plus intent beat biology on these facts and leaving for another day the *Johnson* rule's broader applicability.[124]

4. Genetics Beats Biology

In Ohio, a wife's younger sister had offered to serve as a gestational carrier for the genetic child of the wife, who had undergone a recent hysterectomy, and of the wife's husband.[125] Hospital authorities warned them that the child would be considered illegitimate and that the child's last name on the birth certificate would be the younger sister's.[126] Therefore, before the child was born, the wife and husband brought an action to have themselves declared the child's parents and to have adoption proceedings declared unnecessary.[127] The sister-carrier did not oppose the action.

The court ruled in the petitioners' favor, holding that "under Ohio law . . . the natural parents of [an IVF] child shall be identified by a determination as to which individuals have provided the genetic imprint for that child."[128] Declaring the petitioners the parents before the child's birth obviated any need for adoption proceedings afterwards. The court expressly rejected the significance of the spouses' intent, and criticized the *Johnson v. Calvert*[129] decision for "rel[ying] on the whims of private intent and agreement" and enabling "a private adoption process."[130] This holding seems peculiar, because the parties before the Ohio court were doing precisely the same thing. The only way the court could reach the fair result it did was to ignore the law of public adoption completely. In fact, the *Belsito* court's decision tacitly assumes that all of the adult parties shared exactly the same original intent—in other words that the sister, who may have thought up the idea of

123. *Id.* The court held that the Fasanos "cannot be permitted to purposefully act in such as [sic] way as to create a bond, and then rely upon it for their assertion of rights to which they would not otherwise be entitled." *Id.* at 26. This holding deprived the Fasanos of a hearing to determine the child's best interest.

124. An outcome analogous to the *Johnson*'s holding occurred in the non-surrogacy case *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. 2000). The husband, who had been diagnosed with leukemia, deposited his sperm in a sperm bank before chemotherapy could destroy his fertility. *Id.* at 1258. Eighteen months after he died of the disease, his wife bore twins conceived with her late husband's stored sperm. *Id.* She wanted the twins declared her husband's intestate heirs, under state law, so they could be eligible for Social Security survivor benefits. *Id.* The court agreed with her: "[G]iven the facts of this case, including particularly the fact that William Kolacy by his intentional conduct created the possibility of having long-delayed after born children, I believe it is entirely fitting to recognize that [the twins] are the legal heirs of William Kolacy . . . ." *Id.* at 1263-64. Genetics plus intent beat death.

125. Belisto v. Clark, 644 N.E.2d 760, 761 (Ohio 1994).

126. *Id.* at 762.

127. *Id.*

128. *Id.* at 767.

129. 851 P.2d 776 (Cal. 1993).

130. Belisto v. Clark, 644 N.E.2d at 765-66.

bearing a child for her sibling, was as fundamentally responsible for the ensuing pregnancy as were the intended parents—so the only remaining basis for deciding parentage was the husband's and wife's genetic contribution.[131]

	Genetics	Biology	Intent
Gestational carrier		✓	✓
INTENDED FATHER/DONOR	✓		✓
INTENDED MOTHER/DONOR	✓		✓

5. The Best Interest of the Child Controls

The first time any surrogacy case reached an appellate court in California, the court declined to consider the legitimacy of surrogacy contracts because "even if [the court] assume[d] that the parties' conduct was illegal, the state's paramount interest in [the child's] welfare overrides its interest in 'deterring illegal conduct.'"[132] Two months after the birth of the child, the surrogate had consented to the child's step-parent adoption by the husband-donor's wife.[133] Eight months later, however—and ten months after the child had started living with the intended parents—the surrogate tried to withdraw her consent.[134] The appellate court affirmed the trial court's denial of her request: "We can never ignore the child's best interests . . . . [T]he child's welfare is '*the controlling force* in directing its custody, and the courts will always look to this rather than to the whims and caprices of the parties.'"[135] Given the surrogate's ten-month delay, it was "simply too late" to do anything for her.[136]

This intermediate appellate decision would have drowned in the wake of the California Supreme Court's later decision in *Johnson v. Calvert* to ignore the best interest rule had it not been resuscitated by Justice Kennard's thorough dissent in *Johnson*, adopting the same theme. She argued that "[i]n the absence of legislation that is designed to address the unique problems of gestational surrogacy, this court should look not to tort, property or contract law, but to family law . . . [and] 'the best interests of the child's standard.'"[137] I will propose later in this article

131. A recent frozen-embryo decision, not involving gestational carriers, concluded that genetics controls intent. In *J.B. v. M.B.*, 751 A.2d 613, 615-16 (N.J. 2000), the parties, a divorcing couple, had created and frozen their own embryos against the wife's possible infertility and could not agree on their disposition in the divorce. The wife wanted them destroyed (or at least not used by anyone else); the husband wanted to donate them to his childless sister. *Id.* at 616. The court favored the wife, ruling that "successful use of the frozen embryo by a stranger would result in the impairment, and perhaps termination, of the parental rights of the wife in the resulting offspring." *Id.* at 620. Citing *Baby M.*, the court concluded that "[u]nder New Jersey law, this may not be done without clear and convincing evidence of just cause." *Id. See also* Davis v. Davis, 842 S.W. 2d 588, 604 (Tenn. 1992), *cert. den.* 507 U.S. 911 (1993) (holding that an ex-spouse's right not to procreate trumps ex-spouse's right to donate embryos).

132. *In re* Adoption of Matthew B. M., 284 Cal. Rptr. 18, 25 (Cal. Ct. App. 1991).

133. *Id.* at 22. The wife's adoption would cut off the surrogate's parental rights but not the husband-donor's.

134. *Id.* at 22-23.

135. *Id.* at 25 (quoting Crater v. Crater, 67 P. 1049, 1050 (Cal. 1902)).

136. *Id.* at 26.

137. 851 P.2d 776, 799 (Cal. 1993) (Kennard, J., dissenting).

that that is an inappropriate standard to employ in these cases, but Justice Kennard's opinion offers a conservative solution that coincides with the results of the *Baby M.* line of decisions as well as with Professor Garrison's traditionalist approach and that may appeal to jurists from other states.

6. Intent Beats Biology and Genetics, but the Facts Beat All

Intent preempts in *In re Marriage of Buzzanca*,[138] a gestational carrier case in which the court assigned legal responsibility for the child to the intended parents notwithstanding their gestational and biological detachment.[139] The court's decision rested in part on its satisfaction that the adults' intent should bind them (in fact, the intended mother never denied her responsibility for the child), but in part also on concern for the unpalatable alternative that the child be a legal orphan and a responsibility of the state.[140] John *had* to be the father, or California was going to support the child.[141] To have held otherwise would have been to condemn the public to support every child whom the intended parents and the carrier reject—a grim prospect in any event, but especially so if the reason for the rejection is the severity of the child's birth defects.[142]

To the latter extent, the *Buzzanca* decision was result-oriented. The rule in the altruistic sister case seems equally tailored to a desirable outcome, and the decision in the bi-racial twins case may be as well.[143] Unfortunately, justifying a rule by the outcome stitches the rule to the facts of that case and limits its usefulness in other contexts. For example, the New York court's narrow intent-and-genetics-beat-biology rule would have satisfied no one if Mrs. Fasano had given birth to a single, black child. One wonders whether, under that circumstance, Mrs. Fasano's combined intent (to produce her own child) and biological role would have outweighed the Rogers's intent and genetic contribution. Or would the court have had to invent another factor, such as Mrs. Fasano's "expectation?"[144]

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138. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

139. *Id.* at 293.

140. *Id.* at 292.

141. *Id.*

142. *See, e.g.*, Stiver v. Parker, 975 F.2d 261 (6th Cir. 1992).

143. Using estoppel enabled the court to avoid making the hard choice the California Supreme Court had to make in *Johnson*. Perhaps this is a cynical view of the court's decision, but it is also an unavoidable one.

144. *See, e.g.*, Calvert v. Johnson, 851 P.2d at 783. The *Johnson* court touched on the issue of the gestational carrier's expectation, but not in a context that justified elevating expectation to the significance of intent: "Under Anna's [argument] a woman who agreed to gestate a fetus genetically related to the intending parents would, contrary to her expectations, be held to be the child's natural mother, with all the responsibilities that ruling would entail, if the intending mother declined to accept the child after its birth." *Id.* at 776.

The possible variations on these themes are innumerable. Attorney Susan Crockin has told me of this one, an unreported case from her own professional experience: Black husband and white wife engaged in IVF to produce their own biological child, but the wife gave birth to white twins, apparently not the husband's offspring. It was discovered that the IVF lab had conceived the wife's eggs with another man's sperm. When the husband and wife divorced, the trial court absolved him of parental responsibility for the white twins. Genetics nullified intent? Spoiled expectation vitiated intent?

	Genetics	Biology	Intent	Expectation
Gestational carrier		✓		✓
Intended father/donor	✓		✓	
Intended mother/donor	✓		✓	

And consider the *Buzzanca* decision in this context: Macbeth has brought Lady Macbeth to a fertility clinic[145] in the hope that they may cure their notorious infertility[146] and solidify with an heir Macbeth's bloody claim to the throne. They buy the embryo of anonymous donors and hire a gestational carrier, and nine months later they boast a baby boy, unrelated to either of them in any traditional sense. They cite *Buzzanca* to support their claim that Macbeth's intent renders him the father, so the child must be his heir:

	Genetics	Biology	Intent
Gestational carrier		✓	
Macbeth			✓
Lady Macbeth			✓

My guess is that they lose. Centuries of equity disfavor them.[147]

To the same degree the equities disfavor consistency and predictability in this field of judicial law. There is more to consider than genetics, biology, and intent: There is also the quality of the facts, something that is so unpredictable that it is unrealistic to expect a consistent interstate judicial rule to emerge any time soon.

D. Statutory Responses

Like the academic and judicial theories of surrogacy and gestational carrying, state statutes project an engaging spectrum of ideas, but no comprehensive answer

145. Shakespeare exercised both prescience and artistic license when he endowed Macbeth's medieval Scotland with technological enlightenment.

146. When Macduff hears that Macbeth has slaughtered his family, Macduff regrets that Macbeth's childlessness renders vengeance in kind unavailable to him. WILLIAM SHAKESPEARE, MACBETH, act IV, sc. 3. Earlier in the play Lady Macbeth claims to "have given suck," i.e., to have suckled a child, *id.* act 1, sc. 7, but either she's lying or Shakespeare erred. Macbeth can only have ordered the murder of Macduff's children if he has never experienced children himself. Furthermore, the fact that Macbeth cannot have an heir, and therefore cannot assure the country a peaceful succession to his rule, makes him an inappropriate monarch, so his ascension to the throne adds another unnatural, "foul" circumstance that Shakespeare's self-restoring universe will necessarily undo.

147. ROBERTSON, *supra* note 33, at 135. Professor Robertson suggests another twist: A lesbian couple lives in a state that does not permit second-parent adoption (an adoption process by which an adult becomes a second, live parent of the child of a sole parent). *Id. See* Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *see generally* David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31 (1993)). They seek a child for which they are both the legal parents, so one of the women produces an egg which, after donor-sperm fertilization, the other woman gestates. They share intent equally. Does *Johnson* control? Does genetics equal biology?

to Edward's question or Crispina's and Anna's dispute. Depending on what state you are in, your surrogacy contract could be strictly enforced or could land you in jail. And a brave alternative, proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL), omits out-of-wedlock children, like Edward, who now form a third of the nation's infant population.[148]

1. State Statutes

Do not attempt surrogacy in the state of Louisiana or the District of Columbia. Those two jurisdictions have banned surrogacy and gestational carrier arrangements with outright disdain: They criminalized such agreements and refused to make provision for determining the parentage of any child who might be born under such an arrangement.[149] Other states take an equally austere, but opposite approach, implicitly legalizing surrogate contracts by simply excluding them from the ambit of statutes that criminalize baby selling—but likewise providing no standards for declaring who gets parental rights and responsibilities should someone employ such a contract.[150] Some states bar the enforcement of such agreements but acknowledge that they will occur anyway and provide a standard for declaring who the child's parent is.[151] Arkansas law, on the other hand, enforces surrogacy contracts with strict default rules that automatically endow intended parents with parental authority.[152] Florida, New Hampshire, and Virginia permit surrogate contracts, regulate their terms strictly, and require judicial hearings for their ratification. But New Hampshire and Virginia require a pre-insemination judicial supervision,[153] and New Hampshire requires the parties to satisfy the court that the "surrogacy contract is in the best interest of the intended child."[154] Florida, on the other hand, requires only a post-partem judicial hearing at which the court automatically ratifies the agreement if it meets the statute's formal requirements and if "at least one member of the commissioning couple is the genetic parent of the

148. *See supra* table in note 25.

149. LA. REV. STAT. ANN. § 9:2713 (West Supp. 2001); D.C. CODE ANN. § 16-402 (1997).

150. IOWA CODE § 710.11 (West 1993); OR. REV. STAT. § 163.537 (child selling statute does not apply "to fees for services in an adoption pursuant to a surrogacy agreement"); W. VA. CODE ANN. § 48-4-16 (Michie 1998); NEV. REV. STAT. ANN. § 127.287 (Michie 1997).

151. *See, e.g.*, UTAH CODE ANN. § 76-7-204 (1999) (a surrogacy agreement is "unenforceable," the surrogate mother is the legal mother and her husband, if any, is the legal father, and "the court is not bound by any of the terms of the contract or agreement but shall make its custody decision based solely on the best interest of the child"); MICH. STAT. ANN. §§ 25.248(155) (2000) (a surrogacy contract is "void and unenforceable") and (161) (the court shall "award legal custody on a determination of the best interests of the child"); N.D. CENT. CODE § 14-18-05 (1997) (adopted from the Uniform Status of Children of Assisted Conception Act: the surrogate is the mother, her husband is the father if he is a party to the agreement, and if not or if there is no husband, paternity is established by the state paternity laws).

152. ARK. CODE ANN. § 9-10-201 (Michie 1998).

153. N.H. REV. STAT. ANN. §§ 168-B, 1-28 (1994) (setting mandatory terms of surrogacy contracts, limiting compensation, requiring pre-insemination court petition and court hearing, permitting the surrogate up to one week after birth to elect to keep the child); VA. CODE ANN. §§ 156-165 (Michie 2000) (similar to New Hampshire's, but providing that "any agreement . . . for payment of compensation is void and unenforceable," not permitting the surrogate to keep the child, and providing rules for determining parentage should a surrogacy agreement not receive prior judicial approval).

154. N.H. REV. STAT. ANN. § 168-B:23 (III)(d) (1984). Virginia requires the court to determine whether "[t]he agreement would not be substantially detrimental to the interests of any of the affected persons." VA. CODE ANN. § 20-160(B)(12) (Michie 2000).

child."[155] In contradistinction, Illinois law expressly prohibits any judicial ratification of any surrogacy contract if the parties adhere to certain pre-birth procedures.[156] And, as of last August, thirty states (including Maine) had no statute about surrogate parenthood whatsoever.

2. The Uniform Parentage Act

In an effort to cure this disarray, the NCCUSL has drafted a proposed uniform gestational agreement act as part of its larger Uniform Parentage Act of 2000 (hereafter the "UPA-2000," to distinguish it from the original Uniform Parentage Act of 1973, hereafter the "UPA-1973").[157] In broad outline, the UPA-2000 permits written surrogate and gestational carrier contracts (hereinafter I will adopt the Act's terminology and call all such contracts "gestational agreements"), requires pre-pregnancy court validation of such agreements and, if all prerequisites are met, requires the court to automatically confirm the intended parents as the legal parents of the child when they notify the court of the child's birth. Gestational agreements may provide for payment to the surrogate or carrier for her services, and may not interfere with her right to make decisions "to safeguard her health or that of the embryos or fetus."[158] To qualify for legal parenthood, intended parents must be married; to qualify as a surrogate or carrier, the prospective gestational mother must have had at least one successful pregnancy.[159] If the parties do it right, intent beats genetics plus biology (surrogate), and either intent alone or intent plus genetics beat biology (carrier).

	Genetics	Biology	Intent
Surrogate	✓	✓	
INTENDED FATHER (DONOR)*	(✓)		✓
INTENDED MOTHER			✓

*Parentheses indicate that genetic donation does not affect the outcome.

155. FLA. STAT. §§ 742.13 - .16 (1993).

156. 750 ILL. COMP. STAT. ANN. § 45/6 (West 1999); 410 ILL. COMP. STAT. ANN. § 535/12 (West 1997).

157. As of this writing the UPA-2000 remains in draft form; the date for its final adoption is not yet known. The gestational agreement portion of the new UPA is a derivation of the surrogacy provisions of the 1988 Uniform Status of Children of Assisted Conception Act. This from John M. McCabe, the NCCUSL's legislative director, in an e-mail communication to me on November 1, 2000:

> You will probably want to look at the Uniform Status of Children of Assisted Conception Act, as well. It will be in the final act portion of the website. The gestational agreement (then called surrogacy contracts) provisions in the Parentage Act are derived from that earlier act. The differences are not very great, except that the earlier act also offered an alternative provision that made such agreements unenforceable. You will get a sense of the evolution by comparing the earlier act with the revision of the *Parentage* act.

Letter from John M. McCabe, NCCUSL Legislative Director (Nov. 1, 2000) (e-mail on file with the author).

158. Uniform Parentage Act § 801 (2000) [hereinafter UPA-2000].

159. *Id.* §§ 801(b), 803(b)(5).

	Genetics	Biology	Intent
Gestational carrier		✓	
INTENDED FATHER (DONOR)	(✓)		✓
INTENDED MOTHER (DONOR)	(✓)		✓

The UPA-2000's gestational agreement provisions are notable for their simplicity. The statutory requirements for the contract are few, simply stated and easy to follow, making self-help possible;[160] only one court hearing is necessary, pleadings are minimal, and notice requirements are non-existent (provided that the contract is properly prepared); the court could order a child-welfare study of the intended parents' home but need not do so; none of the parties to the contract needs a lawyer or counselling. In other words, the Act keeps expense to a minimum.[161]

160. *Id.* § 801 (Gestational Agreement Authorized). Section 801 provides the following:

(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;

(2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and

(3) the intended parents become the parents of the child.

(b) The intended parents must be married, and both spouses must be parties to the gestational agreement.

(c) A gestational agreement is enforceable only if validated as provided in Section 803 [by court hearing].

(d) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.

(e) A gestational agreement may provide for payment of consideration.

(f) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus.

Id.

161. This makes the UPA's proposal a substantial improvement over the American Bar Association's Model Surrogacy Act of 1988. The Model Act requires that all donors be examined not only for disease but also for mental health, that the surrogate be examined twice, once by a psychologist and once by a social worker, and that any of the other principals may be required to undergo counseling. The intended parent or parents must provide at least $100,000 life insurance on the life of the surrogate and of the intended parent(s), place all known and estimated expenses in a trust fund before the surrogate is inseminated, and have the surrogate and her husband, if any, advised by an attorney. The Act provides specific details for the contents of a written surrogacy contract. The intended parents bear all of the costs of these services and procedures.

There must be a court hearing within 1 year of the child's birth to certify that the intended parents are the legal parents. The court may deny the application for certification for a variety of reasons, including if it finds that "for the same reasons as in adoption proceedings, either or both intended parents are not fit."

The complexity of the Act suggests that the drafters tried to provide for every possible contingency. Unfortunately, in doing so they rendered compliance with the Act's requirements complicated and expensive, and placed its benefits beyond the means of many people. Given the uncertainty about the outcome of the certification hearing, and therefore about the return on the investment, the drafters gave even pecunious, intended parents incentive to disregard the Act entirely.

Perhaps even more striking, however, is the Act's pragmatism. The NCCUSL apparently concedes that gestational agreements are with us to stay, because there is no hint of a debate about prohibiting them as baby-selling devices. Furthermore, the drafters appear to recognize that people intent on producing children will pay for carrier services to get them no matter what any local statute says about it. So, in an apparent effort to avoid a new variety of Prohibition, in which surrogacy survives but at a much higher price and with much less quality control than if it were legal and regulated, the NCCUSL has chosen to allow the carrier a "reasonable" fee.[162] Probably for much the same reason, the Act permits both surrogacy and gestational carrier agreements.[163] A final order confirming the intended parents as the legal parents may bear whatever teeth are necessary to force a reluctant carrier to surrender the child.[164] The intended parents must be married and minimally plural: Sole, gay and lesbian, and more-than-two intended parents are ineligible to utilize this Act, probably because that reduces the Act's silhouette against attack by conservative opponents.[165] Finally, the NCCUSL undoubtedly fears this consequence of inaction:

> If we take no regulatory action, we will discover in another five or ten years that surrogacy brokers and IVF clinics have arranged for the production of huge numbers of new adoptees, and that a vast array of new enterprises has developed to market genetic material, gestational services, embryos, and babies. This will not be easy to undo.[166]

Given that gestational agreements are legal or unregulated in several states now (not to mention in what must be a multitude of nations), it seems better to commence regulation with an Act that accepts the realities we face than either to attempt to bar the practice entirely or to do nothing.

Those qualities notwithstanding, however, this statutory nugget bears some impurities. First, by limiting its terms to intended parents who are married the drafters seem to have undershot one of their own important targets. The original UPA-1973 was inspired by a series of Supreme Court decisions that "mandated

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162. UPA-2000 § 803(b)(7). *See* Field, *supra* note 4, at 68:

> [A] prohibition of surrogacy would reduce its incidence. Criminalization on a nationwide scale—perhaps by federal statute—would be the most effective. The degree to which surrogacy would be reduced would vary, of course, with the stringency of sanctions and with the extent of efforts to detect the existence of persisting arrangements. But no matter how vigorous the enforcement, it seems likely that some surrogacy arrangements would remain. Another effect of prohibiting surrogacy would be to increase the price of the surrogacy arrangements that would remain.

Id. *See also* ROBERTSON, *supra* note 33, at 140-41: "Paying surrogates (though perhaps not gamete donors) is probably necessary if infertile couples are to obtain surrogacy services. Although surrogates usually act out of mix of motivations, few women not related to the couple are likely to undergo pregnancy and childbirth unless they are paid for their services." *Id.*

163. UPA-2000 § 801 provides that there may be one donor or two, meaning that the gestational mother's own egg may be fertilized.

164. UPA-2000 § 807(a)(2).

165. UPA-2000 § 801(b). The NCCUSL's previous attempt at a gestational carrier statute was the 1988 Uniform Status of Children of Assisted Conception Act, 9B UNIF. L. ANNOT., which got adopted in its original form in only one state (Virginia) and in any form at all in only one other state (North Dakota). The NCCUSL has undoubtedly learned the lesson of political pragmatism from that forlorn experience.

166. BARTHOLET, *supra* note 58, at 223.

equal legal treatment of legitimate and illegitimate children in a broad range of substantive areas."[167] There is no reason to believe that the NCCUSL has retreated from that objective,[168] so it is worth wondering how this Act, which excludes illegitimate children from its ambit, accommodates that policy.[169] In addition, the Act requires that the surrogate's or carrier's husband sign the contract. But one can reasonably expect that many prospective gestational mothers will be economically disadvantaged women who view the Act as an opportunity for needed income, and who also have eschewed the formality of divorce for its expense, inconvenience, or unpleasantness.[170] Making them locate and obtain the cooperation of long-estranged husbands could open old wounds, could be impossible, and will invite them to lie about their marital status. If the presumption of legitimacy applies, that understandable fib raises a specter of the unperfected termination of a legal father's rights. It seems more sensible to consider excluding surrogates' and carriers' husbands as fathers from the beginning.[171]

Of additional concern is this provision: "Whether to validate a gestational agreement is within the discretion of the court, subject to review only for abuse of discretion."[172] That, I fear, is an invitation for courts to do what they often do when they do not know how to decide about children—apply the best-interest-of-the-child standard.[173] My concern is twofold. First, the best-interest standard has

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167. UPA-1973, prefatory note, 9B U.L.A. 288 (1987). The principal Supreme Court decisions were *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972) (unconstitutional for state law to discriminate against illegitimate children in eligibility for unemployment compensation), and *Gomez v. Perez*, 409 U.S. 535 (1973) (unconstitutional for state law to make legitimate, but not illegitimate, children eligible for child support from their natural fathers).

168. In fact, the UPA-2000 section 202, provides: "A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other."

169. The Act excludes a substantial proportion of newborns. I assume—because there is no reason not to—that the proportion of children born to unmarried parents through gestational contracts, compared to children born to married parents through gestational contracts, will be the same as that of illegitimate children to legitimate children in the society at large. Therefore, the Act excludes as many as one-third of all children being born today. *See supra* note 25.

170. *See supra* note 29, *supra* and accompanying text. *See also* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 263: "Since contracting couples need not be concerned about the surrogate's genetic qualities (most importantly, her race), they may favor hiring the most economically vulnerable women in order to secure the lowest price for their services."

171. For further discussion of this issue, *see infra* note 232 and accompanying text.

172. UPA-2000 § 803(c), *available at* http://law.upenn.edu/bll/ulc/upa/fina/00.htm.

173. Consider Justice Kennard's dissent in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), discussed in the text *supra* following note 136.

In *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), a case of first impression in the state, the Supreme Court of Tennessee decided which of the divorcing spouses should be entitled to possession of their cryogenically-preserved (i.e., frozen) embryos. The trial judge had "concluded that the eight-cell entities at issue were not preembryos but were 'children in vitro.'" *Id.* at 594. The judge then awarded "custody" of the "children" to the wife because it was "in the best interest of the children" that she use the embryos to become pregnant so that the children could "be born." *Id.* (The Supreme Court of Tennessee held that the embryos were not children and awarded them to the husband. *Id.*)

In *C.M. v. C.C.*, 377 A.2d 821, 822 (N.J. Super. Ct. 1977), another case of first impression, the court had to decide whether the known donor of sperm that the mother used to inseminate herself was the legal father of the resulting child. The court decided that he was, for the reason that "[i]t is in a child's best interests to have two parents whenever possible." *Id.* at 825.

come under deserved and increasing fire for its vacuity, most prominently and recently by the American Law Institute.[174] These assaults may finally doom that hoary standard forever, and I doubt the wisdom of attacking a computer-age problem with what could soon be recognized as a telegraph-era policy. Second, I also worry that the best-interest standard is simply inapplicable to the problem of identifying the parents of children of surrogates and carriers. Gestational agreements are about making babies, not raising them; the best-interest standard is about raising babies, not making them. The latter has little to do with the former. Because that distinction is universally overlooked, I will pause here to consider it carefully.

3. Screening Parents and the Best Interest of the Child

With very few exceptions, we never screen people for their parental qualities before they mate.[175] This is not because we do not want to protect a child from being naturally conceived by incompetent parents, but because we would be doomed to failure, for practical as well as constitutional reasons, if we tried.[176] There is no way prospectively to protect a child's best interests before natural conception.[177]

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174. *See* PRINCIPLES OF FAMILY DISSOLUTION *supra* note 98, at § 2.02 cmt. (c).

> While the best-interests-of-the-child test expresses a priority in favor of the interests of the child, it has been long criticized because it does not produce uniform or predictable results [and] makes parents unable to anticipate results in their cases, thus encouraging strategic or manipulative behavior that is adverse to the child's interests. The parent who cares least about the child may pressure the other parent into financial or other compromises that are unfair and do not serve the child's interests, or force a case into litigation that could have been settled if the result were more predictable. Thus, even if the best-interests-of-the-child standard may produce the best result in some individual cases, it may have a highly undesirable effect on cases in general.

Id.; see also BARTHOLET *supra* note 58, at 229 ("the vacuous best interest standard").

The progenitor of this criticism may have been Robert Mnookin, who proposed in 1975 that "[i]ndividualized adjudication [under the best-interest rule] means that the result will often turn on a largely intuitive evaluation based on unspoken values and unproven predictions. We would more frankly acknowledge both our ignorance and the presumed equality of the natural parents were we to flip a coin." Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, L. & CONTEMP. PROBS. Summer 1975, at 226, 289.

175. The reproductive freedom of some people is governmentally controlled. Wards of the state may not be allowed to mate. *See, e.g., In re* Estate of D.W., 481 N.E.2d 355 (Ill. App. 1985); *In re* Moe, 432 N.E.2d 712 (Mass. 1982). Prisoners are usually prohibited from doing so. *See* Doe v. Coughlin, 518 N.E.2d 536 (N.Y. 1987). Children are indirectly prevented from procreating by universal statutes criminalizing intercourse with (and therefore by) any person under a certain age (usually 14). *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 253(1)(B) (West 1998). Of these rules only the first screens people for their parental qualities per se.

176. Assuming that we could figure out how to intervene before people copulate, or what we ought to do about it if they mate without our consent, we would face a large constitutional obstruction. "Marriage and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

177. At least one authority has suggested that we license natural parents the same way we license adoptive parents. Hugh LaFollette, *Licensing Parents*, 9 PHIL. & PUB. AFF. 182 (1980). LaFollette's argument is that we should consider parenting as seriously as we do driving a car, which we license. In that he is surely correct, but to the best of my knowledge, no state has adopted that idea in the twenty years since it was proposed. *See also* Claudia Pap Mangel, *Licensing Parents: How Feasible?*, 22 FAM. L.Q. 17 (1988).

Nevertheless, the debate, now focusing on "eugenics," continues. For a discussion of "positive eugenics," see, Harold P. Green, *Genetic Technology: Law and Policy for the Brave New*

After conception, there is this narrow concern for the child's welfare: The state is said to have an interest in protecting "the potentiality of human life."[178] In other words, the fetus's actual survival is an issue.[179] But, still, nobody can argue for the child's best interests; one would not know how to begin.[180]

Immediately after birth there are and have always been rules of law that protect certain of a child's interests, but only to a limited extent. The presumption of legitimacy historically imposed on the husband of the mother the responsibilities of maintenance, protection, and education.[181] Education came later, of course; the initial legal responsibilities were for little more than keeping the child alive. Almost the same was true for the father of an illegitimate child, whose responsibility was "only that of maintenance."[182] These traditional rules always assigned the father of any infant some degree of financial responsibility—but no more than that. An automatic, post-partem allocation of responsibilities based on the child's best interests did not exist.

World, 48 IND. L.J. 559, 572 (1972): "If another nation should embark upon a successful program for upgrading its people so as to produce super-intellects, super-soldiers, or even super-athletes, would it be possible for the United States to stand idly by, watching, but not seeking to emulate these accomplishments?" For a discussion of "negative eugenics," see William T. Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, U. ILL. L.F. 189, 222 (1971): "[T]he state might have the constitutionally required compelling interest to adopt a negative eugenics program.... A negative eugenics program is designed to diminish suffering and costs occasioned by genetic disease.... The eradication of misery and diminution of illness are clearly good today."

178. Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992).

179. "[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973)).

Some caselaw has begun expanding mothers' duties to their fetuses. See Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599 (1986), discussing, for example, a decision to allow a child to sue his mother for damages because she took a drug during her pregnancy that discolored his teeth, and other decisions requiring women to take blood transfusions and to undergo Caesarian birth, and ordering them into custody to protect their fetuses from what the courts deem to have been harmful medical decisions. The trouble with these rulings is that they violate women's right to bodily autonomy, to privacy in matters relating to procreation and, arguably, to equal protection, because making women protect fetuses against all injury recalls traditions prohibiting them from entering the labor force and relegating them to home duty. *Id.* at 605-07. At this point, it is difficult to know how far this expansion will take us, but there is no suggestion that it should require a pregnant woman to pursue her fetus's "best interest," whatever that might be.

Maine protects fetuses with a statute that declares felonious any act to "use, transfer, distribute or give away any live human fetus, whether intrauterine or extrauterine, or any product of conception considered live born." ME. REV. STAT. ANN. tit. 22, § 1593.

180. Nor would we like it if we did. "We would not dream of telling pregnant people that when they give birth, the government will decide whether they can keep the child on the basis of whether a social worker thinks that the child looks like a good match for their particular parenting profile." *See* BARTHOLET, *supra* note 58, at 79.

181. WILLIAM BLACKSTONE, COMMENTARIES *160 (G. Chase ed. 1877).

182. *Id.* at *172. It should be noted that until 1576 the father of an illegitimate child had no duty to support the child. That changed with the Elizabethan Poor Law, 18 Eliz. 1, c.3 (1576), which transferred the burden of supporting illegitimates from the parish in which they were born to the putative fathers. C.C. v. A.B., 550 N.E.2d 365, 368 n.3 (Mass. 1990).

Little has changed since then. Under current child protection statutes all parents must protect all their children from harm; legitimacy is immaterial.[183] But that duty remains an essentially defensive one; parents have no affirmative, legal obligation to pursue their infants' best interests.[184] Illustrative of this fact is the Uniform Act on Paternity (of which Maine's principal paternity statute[185] is a close adaptation, and that should not be confused with the Uniform Parentage Acts of 2000 and of 1973). Under that Act, the court's sole objective is to establish the identity of the father and to issue a support order.[186] Maine's version of the Act

183. In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Supreme Court declared:

> [T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.

Since then, the dividing line between parental autonomy and the authority of the state to protect children's interests has been anything but bright. *See* Parham v. J.R., 442 U.S. 584, 604 (1979) (stating that parents have "a substantial, if not the dominant, role in the decision" to commit their child to a mental health institution); Stephanie L. v. Benjamin L., 602 N.Y.S.2d 80, 83-84 (1993) (stating that the courts serve "the important societal function of protecting children, even from their parents if necessary" but do not "serve as a 'super parent,' reviewing and correcting the decisions of a child's lawful parents").

The simplest definition of the relationship between parental autonomy over, and governmental responsibility for, children is that the state may protect children from their parents' neglect or abuse. Parham v. J.R., 442 U.S. at 603. Maine law reflects that standard: Maine's Child Protection Act, ME. REV. STAT. ANN. tit. 22, §§ 4001-4091, authorizes the State "to protect and assist abused and neglected children, [and] children in circumstances which present a substantial risk of abuse and neglect." *Id.* § 4003(1). The statute defines "abuse or neglect" as "a threat to a child's health or welfare by physical, mental or emotional injury or impairment, sexual abuse or exploitation, deprivation of essential needs or lack of protection from these." *Id.* § 4002(1).

It may be said, therefore, that the birth of a child imposes on the parent the responsibility to provide essential needs that protect a child from harm. There is no statute, however, that imposes on the parent the duty to seek the child's best interests.

184. *See supra* note 183.

185. ME. REV. STAT. ANN. tit. 19-A, §§ 1551-1616. *Compare* UNIFORM ACT ON PATERNITY, 9B U.L.A. 350 (1960).

186. THE UNIFORM ACT ON PATERNITY § 11 provides:

> Judgments under this Act may be for periodic payments which may vary in amount. The court may order payments to be made to the mother or to some person, corporation or agency designated to administer them under the supervision of the court.

Id. at 363. Maine's version of the same section, 19-A M.R.S.A. § 1565(1) (1998), reads:

> Judgments under this subchapter may be for periodic payments that may vary in amount. The court may order payments to be made to the person to whom the support is owed or to the person, corporation or agency designated to administer payments under the supervision of the court.

Maine statutes also provide for an expedited determination of paternity and support, available only to the Department of Human Services. 19-A M.R.S.A. § 1606 provides:

The department may request that the court:

> 1. Establish the alleged father as the biological father of the child;
> 2. Order the alleged father to make child support payments
> . . . ;
> 8. Grant such other relief as the court determines just and proper, including an initial allocation of parental rights and responsibilities as allowed by section 1565.

enhances the original by permitting the court to order the "initial allocation of parental rights and responsibilities," but the court need not do so and need not hold a hearing on the child's best interests.[187] That must occur only if one of the parents objects to the initial order and files a separate complaint to contest it.[188] For spouses, Maine provides two separate statutes, one dealing just with support[189] and one dealing with all parental rights and responsibilities.[190] An order under the former permits a temporary order of support pending a determination of the child's best interests, but does not permit a best interest order; an order under the latter addresses the child's entire best interest and "must include . . . [a] provision for child support . . . or a statement of the reasons for not ordering child support."[191] The early imposition of financial responsibility under all of those statutes is an axiom derived directly from historical practices.[192]

That is as it should be, for the reason that the best-interest-of-the-child rule examines the personal and social relationships that develop between parent and child, characterized by such things as are described in Maine's best-interest statute: "The relationship of the child with the child's parents . . .";[193] "[t]he duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity";[194] "[t]he child's adjustment to the child's present home, school and community";[195] and "[t]he capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent . . . ."[196] That triangular relationship has not developed when, upon the birth of the child, the parents' financial obligation begins. To apply the best interest standard to identify parents from the earliest days of the child's existence is to require judgment of only a fraction of the whole: The adults certainly have some sort of relationship with each other, but their relationship with the child is only rudimentary because the child's social skills, and sometimes the adults' parenting skills, are undeveloped. To be sure, if someone files a complaint asking the court to declare parental rights and responsibilities soon after a child's birth, the court will have to decide the child's best interests, and perhaps with incomplete information. What renders that task unsatisfactory, however, is the fact that the best-interest rule is

187. 19-A M.R.S.A. § 1565(2), provides:

> The court may order an initial allocation of parental rights and responsibilities. The order of the court must provide notice that if either party objects to the allocation, that party may file a complaint pursuant to section 1654 and that an order from that action supersedes this initial allocation of parental rights and responsibilities. It is within the court's discretion to award or allocate parental rights and responsibilities under this subchapter and the [D]epartment [of Human Services] is not a party to this issue. In resolving parental rights and responsibilities issues, the court may not delay entering a determination of paternity and an initial order concerning child support.

188. *Id.*

189. ME. REV. STAT. ANN. tit. 19-A, § 1652 (West 1998).

190. *Id.* § 1653.

191. *Id.* § 1653(2)(D)(3).

192. There is one exception to this rule. The paternity of an out-of-wedlock child may be established if "while the child is under the age of majority, [a man] receives the child into his home and openly holds out the child as his natural child." UPA-1973 § 4(a)(4). In this circumstance, the paternity of a child is determined by precisely the same conduct that will be considered to determine the child's best interests.

193. ME. REV. STAT. ANN. tit. 19-A, § 1653(3)(B).

194. *Id.* § 1653(3)(C).

195. *Id.* § 1653(3)(G).

196. *Id.* § 1653(3)(H).

should be.[202] I disagree with them not only for the reason that the best-interest rule is hardly a rule at all and, even if it were, simply does not work in that context.[203] In addition, using the best-interest standard to determine parentage could require a substantial judicial hearing even in uncontested cases, because proving best interest to a judge's satisfaction can be complicated even when there is no opposition.[204] With that in mind, one must address this fact of life: People will not litigate if they do not have to. My own experience with the increasing irrelevance of divorce is symptomatic of that tendency, and Professor Garrison herself acknowledges it when she observes that "in 1991, almost three-quarters of never-married mothers . . . reported that they had not obtained support awards from their children's fathers, and almost half reported as a reason for inaction that they 'had not pursued' or did 'not want' an award."[205] If parents will not bother with their own divorce, and will not litigate the sole issue of child support when they have a financial incentive to do so, can we realistically expect them to litigate the child's entire best interest? We have no way to make them come to court,[206] so we must

202. *Id.* at 790. Justice Kennard's opinion is discussed *supra* in the text following note 136. Two scholars advocate the straight application of the best interest rule in articles that I discuss in the text following *supra* note 94.

203. For a discussion of the rule's "vacuity," see the text following *supra* note 173. The "context" to which I refer starts at childbirth. I do not believe that Justice Kennard would attempt determining the child's best interest prior to the signing of a carrier agreement or during pregnancy.

204. This has been a matter of debate in Maine. I maintain that child custody hearings can be summary and need not be testimonial, but I am a minority almost of one. The amount of evidence necessary to convince a judge of the child's best interest in an uncontested case can be considerable. *See* John C. Sheldon, *A Sleepwalker's Tour of Divorce Law*, 48 ME. L. REV. 8 (1996).

205. Garrison, *supra* note 49, at 911-12 (footnotes omitted) (*citing* LYDIA SCOON-ROGERS AND GORDON H. LESTER, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991 (Bureau of the Census, U.S. Dept. of Commerce, Series P60-187, 1995)). Sixty-five percent of custodial fathers who did not have any support awards cited the same reasons. *Id.* at 911-12.

By 1998, 43.7 percent of custodial parents (6.1 million of the 14 million custodial parents) in the U.S. had no support orders or agreements, while another 4.3 percent had only nonlegal informal agreements or understandings. *See* Timothy Grail, *Child Support for Custodial Mothers and Fathers: 1997* (Bureau of the Census, U.S. Dept. of Commerce, Series P60-212, October, 2000) at 3. Almost a third of them "did not feel the need to get legal," while over half did not want the other parent to pay, had not legally established paternity, or did not want contact with the other parent. *Id.* at 3 tbl.4.

Those statistics confirm my own unstatistical observations: There are two principal circumstances when unwed parents litigate children's best interests: (1) in a hearing on a petition for protection from domestic abuse; (2) as an adjunct to a Department of Human Services action for support contribution from the non-custodial parent for public assistance paid to the custodial parent. Unless prompted by violence or corralled by a public entity, unmarried people do not litigate parental rights and responsibilities.

206. We could threaten people with criminal penalties for failing to establish parenthood, but that is an inefficient way to earn people's cooperation, and penalties against parents hurt the very children we are trying to protect. Furthermore, such a policy might not be an adequate inducement to the gay and lesbian population, who might consider judicial discrimination under an absolutely discretionary statute like the UPA-2000 more dangerous than criminal penalties. *See* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (*quoting* Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985)), where a maternal grandmother was awarded custody of a lesbian mother's child because, in part, the child was "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and with the community at large.'"

poorly tailored for early application.[197] There is no reason to confuse the ultimate objective of achieving the child's best interests with the immediate and limited objective of identifying which adults have to support the infant.

That distinction is not revolutionary in our family law. It has merely been overlooked. The *Baby M.* decision hinted at it in the context of a discussion of parents' rights:

> The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that. . . . The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation.[198]

The Supreme Court suggested the same thing in *Lehr v. Robertson*:[199] "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. . . . [I]f and when one develops, the relationship between a father and his natural child is entitled to protection . . . ."[200] What the Supreme Court is identifying as the relationship worthy of constitutional protection is the same relationship that trial courts explore when they try to determine the best interest of the child. On the other hand, what does arise within *Lehr*'s meaning of "the biological connection between parent and child" is a financial responsibility for support.

For this reason, I disagree with Justice Kennard's opinion in *Johnson v. Calvert*,[201] and the suggestions of some scholars, that the best-interest standard should be used to determine who the parents of a child born to a gestational mother

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197. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 100, proposes replacing the best-interest rule with one that "allocate[s] custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action . . . ." *Id.* § 2.09(1). Implicit in that proposal is the idea that the determination of a child's future interests is a function of a relationship that already exists.

Early application of the best-interest rule for first-time parents is an invitation for a later motion to amend the custody order. Normally, a party making such a motion must show that there has been a substantial change of circumstances since the last custody order was issued. If a custody hearing occurs just after the birth of the couples' first child, either party will be able to argue that the later development of a two- or three-way relationship that did not exist at the time of the first hearing is a substantial change of circumstances.

198. Matter of Baby M., 537 A.2d 1227, 1253-54 (N.J. 1988).

199. 463 U.S. 248 (1983).

200. *Id.* at 260 (*quoting* Caban v. Mohammed, 441 U.S. 380, 397 (Stewart, J., dissenting), 414 (Stevens, J., dissenting) (1979) (footnote omitted, emphasis in *Lehr* omitted here)). *Lehr* describes that relationship further:

> [T]he mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."

Id. at 261 (*quoting* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (*citing* Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)) (footnote omitted)).

201. 851 P.2d 776, 788 (Cal. 1993).

accept the likelihood that confronting them with legal complication (not to mention expense) is to condemn many of their children to a parentally ambiguous existence. This is especially unfortunate when, in the largest run of cases, the adults will probably agree about who the parents are and need nothing more than an official administrative confirmation. Conversely, for an Act to induce people to come to court it must combine powerful incentives with narrow issues, minimal expense, and no hassle.

In sum, if we are to accept Professor Garrison's advice to stick to the tried-and-true rules of family law as much as possible,[207] we will not use the best-interest rule to identify parents. Instead, we will keep it as simple as we possibly can, with straightforward rules that apply upon a child's birth. The UPA does not do that, and its commendably pragmatic spirit suffers as the result.

V. A STATUTORY PROPOSAL FOR MAINE

I propose that Maine adopt a revision of the UPA-2000's gestational carrier provisions. I do not recommend that Maine consider adopting the entire UPA-2000 at once, for two reasons. The first is the same reason why I have not reviewed the entire Act in this one article: The sheer magnitude of the debate about its multitudinous provisions may doom the entire initiative. Second, if my discussion about its gestational carrier provisions is a reliable indication, the balance of the UPA-2000 may require some tweaking before it will satisfy us. Nevertheless, I propose following the NCCUSL's lead because theirs is an earnest attempt at a comprehensive solution to the legal problems of reproductive technology, it is an effort at much-needed uniformity, it is recent and therefore probably more enlightened than any other statute, and we simply have to get started. And I propose starting with gestational agreements—arguably the most complicated legal wrinkle in the field of technological reproduction—because we have delayed too long: If we are going to protect children we must take a significant rather than a half-hearted step.

In its broadest outline, the statute I propose (which is found in the Appendix to this Article) defines the minimum prerequisites for any gestational agreement and establishes a simple court procedure for the parties to follow.[208] Before the gestational mother's impregnation, the parties obtain from the court clerk a pre-printed petition for confirmation of the agreement, fill it out and file it with the court, along with a copy of their gestational agreement and proof of screening for the

207. *See* text following *supra* note 84.

208. I propose using the courts to administer the process, rather than some other agency (such as the Department of Human Services) for several reasons. First, Maine's District Courts are ubiquitous and their whereabouts known to most residents. Second, the courts already address parental rights and responsibilities broadly (as compared to the Department of Human Services, which administers principally child support and child protection issues). Third, my proposed statute acknowledges the possibility of disputes and empowers the court to address them (see Section 311, which concerns the allegation that the birth is not the result of assisted reproduction); if the matter is already before the court quick resolution is possible. Fourth, courts have a solemnity about them that encourages many people to act truthfully.

HIV virus and AIDS.[209] There are no filing fees. The court "validates" the petition if it meets the statutory prerequisites, thereby authorizing the parties to fulfill the contract. After the child is born, either an intended parent or the gestational mother or some other person on behalf of any one of them notifies the court of the birth, upon which the court "confirms" the identity of the parent(s) and orders that a revised birth certificate be issued.[210] What follows herebelow are the salient features of the statute I propose, with explanations.

A. Baby Selling

I agree with the NCCUSL's implicit conclusion that gestational agreements should neither be considered baby-selling contracts nor for that reason banned. True surrogacy agreements for compensation, of course, approximate that sin more closely than do altruistic surrogacy agreements and for-profit or altruistic gestational carrier agreements,[211] for the reasons that *Baby M.* expounded on.[212] But even if all four could be characterized as baby selling, none should be prohibited because, frankly, the opprobrium of the practice is surely waning.[213] To recognize that, all we have to do is inspect our emperor's clothes objectively.

As I write this text, I have before me a flyer from an organization that "assist[s] families in adopting children from many foreign countries, as well as children born in the United States."[214] The flyer lists the cost of obtaining a child from a variety of countries, and the cost figure "refers to the current fee charged by the foreign contact for adoption services completed in the child's birth country."[215] The cost

209. If any party has the HIV virus or AIDS, the parties must file proof "that means will be utilized to prevent the infection of the child." No screening for other diseases is required for three reasons. First, no other disease is as dangerous as AIDS. Second, more extensive screening increases the parties' costs and reduces their incentive to utilize the statutory procedure. Third, the requirement can be considered discriminatory, because there is no requirement that participants in heterosexual intercourse be screened before they conceive.

210. If, for some reason, none of the parties notified the court, any of their friends or relatives or, for that matter, the Department of Human Services (DHS), could notify the court to confirm the gestational agreement and order a new birth certificate. Among other things, this permits the DHS to intervene to compel the intended parents to take responsibility for an infant with severe birth defects whom the intended parents might prefer not to have to raise themselves.

211. *See, e.g.*, Belisto v. Clark, 644 N.E.2d 760 (Ohio Misc. 1994), discussed in the text *supra* accompanying notes 125-31.

212. *See* Matter of Baby M., 537 A.2d 1227 (N.J. 1988). See *supra* note 86.

213. I should note here another anomaly: To call surrogacy for compensation baby selling, and altruistic surrogacy not baby selling, is to declare the first unenforceable in the courts for its violation of public policy, but to allow enforcement of the latter. That means that the paid surrogate gets to keep the money she earns and the child she bears, but the altruist gets neither. FIELD, *supra* note 4, at 23.

214. Intentionally not cited. The flyer was "last updated 10/20/00" and is on file with the author. I am acquainted with three different people who obtained or now seek to obtain adopted children from foreign countries through this agency. I decline to name the organization, however, because it is not fair to single out this particular enterprise for engaging in the conduct I describe below in the text. In fact, I do not derogate any person who, or group that, assists Americans with foreign adoptions; I commend the practice. But some may be offended by how I characterize it, and I do not want to focus that characterization on a single organization.

215. Intentionally not cited. The cost indicated "may not include foster care, medical expenses of the child, the child's visa or document processing [or the agency's] fees [or] travel, translation of documents or escorting fees—unless so noted." None of the costs I list below in the text bears such a notation.

for a child from Cambodia is $6,900 to $7,400; the cost for a child from Vietnam is $13,500; a child from Lithuania $12,000; from Moldova $11,250; from Guatemala $12,750; from the United States $12,000.[216]

I am told that these expenses support the orphanages where the children reside and the costs of the in-country administration of the programs. They probably do, but they also probably do more than that. I have spent too much time in third-world countries to accept either that orphanage and administration expenses are that high in Cambodia, Vietnam, Lithuania, Moldova and Guatemala, or that nobody's making a good profit there.[217] Altruism may exist to some degree in some of those programs, to be sure, but it is probably neither a ubiquitous nor an exclusive motivation.[218]

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216. The cost figure for a child from the United States carries the following information: "Varied costs with networking agencies[.]"

217. It may not be the mothers themselves who are making much or even any profit, but that only means that it is a retail rather than a wholesale market.

218. It may be in this country, however. I assume the complete integrity of the organization whose flyer I have been quoting, of its principals, and of other such organizations. What that flyer does by listing the costs for obtaining children in other countries is to alert prospective parents to the facts of life in the Third World.

My own research on the profit that international adoption brings to the countries of the children's origin has deepened my suspicions. One recent article especially provoked this reaction by describing what seems a paradox. While "[i]nternational adoption is a 'big money' industry, with each adoption costing anywhere from $10,000 to $26,000," the author states, that fee achieves a humanitarian purpose because it "often includes a substantial required donation to the local orphanage" of "between $1,000 and $3,000." Kimberly A. Chadwick, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L. LEGAL STUD. 113, 130 (1999) (footnotes omitted). Assuming that the "donations" really go to the orphanages, that leaves between $9,000 and $23,000 unaccounted for and available for other recipients. Because each country of origin regulates its own law on the subject, the distribution of all of those donations and fees is subject to local practice, and local practice is unlikely to reflect what our culture would consider the highest moral standards. For example, Ms. Chadwick states that "Romania[n] law now prohibits any adoptions that result in financial gain for any of the participants," but concedes that Romania's shattered economy creates "[c]onditions . . . perfect for a black market consisting of bribes, forged documents, and duressed mothers," and does not assert the quality of Romanian law enforcement. *Id.* at 132-33 (footnotes omitted).

Of additional interest is the fact that in the Ukraine the local authorities require prospective, foreign adopting parents to provide detailed information about their financial conditions. Ms. Chadwick explains that "the Ukraine wants to ensure the most financially secure environment for internationally adopted children." *Id.* at 134. However, she concludes that such a requirement is inexplicable given the relative destitution of most Ukrainians, and therefore that "money is the true decisive factor in the Ukraine." *Id.* In other words, the Ukraine permits only people of financial means to adopt Ukrainian children, but for reasons that are barely related to the child's ultimate welfare. It is difficult to reconcile that policy with the argument that international adoption is not, at least in part, a market phenomenon.

Trading children to Americans for profit is less odious than other ethical problems in the field of international adoption, such as the international trafficking of children for sexual and economic exploitation and for forced marriage. The Society for Advanced Legal Studies (Family Law Working Group), REPORT ON THE CROSS BORDER MOVEMENT OF CHILDREN 44-46 (1999). The 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption is supposed to address all of these problems. *Id.* at 93. (The United States was a signatory to the Convention, but legislation implementing it has only recently been recommended to the full House of Representatives by its Committee on International Relations. Eliezer D. Jaffe (ed.), INTERCOUNTRY ADOPTIONS—LAWS AND PERSPECTIVES OF "SENDING" COUNTRIES (Martinus Nijhoff Pub., 1995) at 237; H.R. Rep. No. 106-691, pt. 1 (2000).) However, the Convention

More important than my opinion, however, is that there cannot be many in this country who would disagree with those assumptions. We all suspect that those who adopt from foreign countries are actually paying profiteers in order to obtain babies.[219] We cannot deny that a good profit at the other end increases motivation there to produce more babies for the American adoption market. We are willing to ignore that this may be precisely what is happening, because we think it's worth it for the children's benefit.

Nor can we deny the ingredient of self-interest. Many Americans want to raise babies, cannot have their own, and recognize that adoption in this country is complicated and expensive if not impossible.[220] So they turn to other countries in the spirit of the worldwide public good—and also because they want to raise a child. Both the spirit and the objective are commendable. What would be less commendable would be to deny what this means: We are growing tolerant of baby selling because we want children to raise.[221]

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leaves to each country of origin the exclusive responsibility for administering the Convention's terms and policing its citizens' compliance, so even widespread ratification is unlikely to change current practices in the near future. *See* William Duncan, "The Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993," in Jaffe, *supra*, at 227.

219. Anyone who would deny that may be ignoring the experience in this country. Entrepreneurial profiteering has made American baby-selling especially pernicious. NANCY C. BAKER, BABY SELLING—THE SCANDAL OF BLACK-MARKET ADOPTION 115 (Vanguard Press 1978):

> [American] entrepreneurs are both shrewd and adaptable. When sources of American babies threatened to shrink, they supplied foreign babies. When the immigration authorities balked at letting these foreign children into the country, the baby brokers brought in pregnant women and had them give birth here. When some natural mothers changed their minds and wanted to keep their babies, the entrepreneurs invented worthless contracts for them to sign saying they agreed to repay everything spent on them if they kept their babies.
>
> . . . .
>
> The baby brokers recognize easy money when they see it. They also recognize a low risk business. And they're going after both in the adoption black market.

220. *See* BARTHOLET, *supra* note 58, at 34, 73. Bartholet notes:

> The parental screening requirement [of public adoption] is a very real deterrent to many who might otherwise consider adoption. People don't like to become helpless supplicants, utterly dependent on the grace of social workers, with respect to something as basic as their desire to become parents. Screening also adds to the financial costs of adoption. Because it takes time, prospective parents must endure the related delays in forming a family. Screening turns the process of becoming a parent into a bureaucratic nightmare in which documents must be endlessly accumulated and stamped and submitted and copied.
>
> The parental screening system applies only to those who do not possess the money to buy their way around it. . . .

Id.

221. Nor should we ignore the fact that our private adoption practices approach baby-selling themselves. Bartholet explains:

> The [public adoption] system's rules proclaim that parents must be screened for fitness and that money cannot be used to obtain children, because children should not be treated as property to be sold to the highest bidder. But the reality is that prospective parents with money can and do bypass the screening system to obtain the children who are thought to be most desirable. The reality is that children are treated as property . . . .

Id. at 50.

The opponents of baby selling will find another challenge in the growing practice of selling pedigreed embryos to couples who cannot conceive. *See* Gina Kolata, *Clinics Selling Embryos Made for "Adoption,"* N.Y. Times, Sunday, Nov. 23, 1997, at A1 and A34.

If this conclusion is correct, it is hypocritical to decry gestational agreements. If we pay profiteers for children abroad, we do not recoup our virtue by demanding inconsistency here. Nor does a limited tolerance for baby selling in the United States of America represent a societal risk. To the extent that we regulate carrier agreements we also control the baby selling (if we have to call it that) and negate the risk. It is like setting speed limits on roads: Just because we allow people to drive fast on certain highways does not mean that we allow everyone to drive as fast as they want wherever they want. Regulating carrier agreements will not legitimize widespread baby selling; cracking open the lid of this particular box does not let all the evil beasties out.[222]

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222. Some people have suggested to me that surrogacy is a form of prostitution, but I disagree. Prostitution is a service usually performed by a woman upon a man for the man's sexual gratification, for the woman's economic gain, and devoid of affection or procreative intent. Surrogacy, on the other hand, is usually a service performed by a woman for a person whose gender is immaterial for the purpose of procreation, not for anyone's sexual gratification but to fulfill affection, and perhaps but not necessarily for the purpose of the woman's economic gain.

Other opponents of surrogacy liken it to organ-selling, and would prohibit it for the same reason that we prohibit selling kidneys—to prevent underprivileged people from succumbing to the temptation to market their irreplaceable organs. The comparison fails, however: Human eggs are plentiful:

> As the ovaries are being formed in the embryo, they come to contain a total of almost 2 million diploid cells called oocytes, all with the potentiality to become ova. . . . [By puberty] only some thirty thousand to forty thousand oocytes remain. A mere four hundred or so will eventually leave (at a rate of one a month for the next thirty-five or forty years), each from one or the other ovary, without any regard to an orderly sequence.

SHERWIN B. NULAND, THE WISDOM OF THE BODY 160-61 (1997).

Another objection—that impoverished women will be compelled by market demand from the rich to expose themselves to the dangers of child bearing and childbirth—would, if extended, bar many racial-minority athletes from competing in professional athletics.

Notwithstanding how I parry these thrusts of principle, however, I realize that my tolerance for surrogacy and baby selling will appall some. I invite them to consider history's lesson: What is dogma one day may be detritus the next. In 1959, when sentencing Mildred Jeter and Richard Loving to a suspended year in jail for violating Virginia's miscegenation statutes, the Virginia Circuit Court judge said this:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving v. Virginia, 388 U.S. 1, 3 (1966) (citation omitted). A lot of people believed that then, even though by 1959 an irresistible social current had already turned against segregation.

My position on baby selling, as well as my thesis on gestational motherhood, challenges fundamental moral tenets:

> [A]rtificial insemination threatens to remove the biological process of procreation from the psychophysical totality of the marital fellowship. This would appear to infringe upon the personal character of this fellowship, since it is deprived of one of its essential purposes, namely, the physical fellowship, which allows the inward fellowship to become outward and symbolic and thus "total" and which completes this expression in the will to have a child together. . . . The divine commission given to marriage in [God's] creation is to the effect that both are created for each other (as a polar unity, Gen. 1:27) as "one flesh" (Gen. 2:23-24) and that *in* this oneness they are to satisfy the command, "Be fruitful and multiply." The personal unity of man, wife, and child would therefore be ruptured by any isolation of the biological act of procreation.

B. The Requirement of Marriage

It is not clear why the UPA-2000 requires the intended parents to be married (the Comments and Reporter's Notes are not available at this writing), but there are probably two reasons. The first is that it guarantees a child two, rather than one or three or more parents, and the second is that it reduces the Act's exposure to criticism for promoting unwed parenthood. Both are understandable goals. I disagree with them.

Current consensus seems to make two the optimal number of parents.[223] No one knows if that is always so, or necessarily so,[224] but two parents is a presently unimpeachable standard upon which to base any parenting statute. My proposal also permits single parenthood, for the practical reason that we cannot prevent people from hiring surrogates or carriers for the purpose of becoming single parents, and any statute that does not address the parenthood of children born to that circumstance will leave such children unprotected.[225] Furthermore, single parenthood is common enough to have become tolerable, if not a norm. However, for

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HELMUT THIELICKE, THE ETHICS OF SEX 251 (John W. Doberstein trans., 1964). Many people may have shared Thielicke's ideal thirty-five years ago, and some still do, but that does not render it a sound basis for modern social policy; the current of social change has worn it pretty thin. I think the same current has been eroding our long-standing policy against baby selling too.

223. Garrison, *supra* note 49, at 887-89.

224. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 474 (1990). Polikoff argues the following:

> Some cultures have family structures that incorporate many parental figures. In Polynesia, for example, parenting is a collective task. . . .
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> . . . .
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> Parenting is also a community responsibility in certain regions of the United States. Anthropologist Carol Stack documented the assumption of parental rights and responsibilities in The Flats, the poorest section of a black community in a Midwestern city. She described child rearing, or "child-keeping," by relatives and friends that in many circumstances creates parental rights and obligations recognized by the community . . ., coterminous with the rights of the biological mother.

Id. (footnotes omitted).

225. Professor Garrison disagrees, arguing that two parents are better than one and that the mere fact that technology can produce children for single individuals does not justify a policy that permits or encourages single parenthood and thereby deprives children of the "opportunity to know and experience care from both of their parents." Garrison, *supra* note 49, at 907.

> [O]utside the AID context, our legal system grants no parent, male or female, the right to be a sole parent. . . . A rich single mother who conceives sexually—a Madonna or Mia Farrow, for example—cannot unilaterally rid herself of her child's father simply by demonstrating lack of need or disinterest in child support. There is no obvious reason why a woman employing AID, rich or poor, should be able to do so either.

Id. at 906-07. The argument is subtle, skirting but implicitly acknowledging the fact that there are reasons for single parenthood beyond indifference and self-sustenance. One obvious reason is this: A single mother may—more accurately, must—unilaterally rid herself of a father who is violent toward her. By implication, therefore, women who have any reason to be gun-shy of abuse must also have the right to parenthood that avoids risk. And if women have that right, so must men. That makes for a pretty broad exception to Garrison's claim, and one that is likely to widen further with the ever-expanding concepts of "abuse" and "violence."

Professor Garrison cites no authority for the converse proposition, that our legal system denies adults the right to be sole parents. That must be because there is no such authority. Furthermore, it seems inappropriate to suggest, as she apparently intends, that the absence of law con-

purely pragmatic reasons I draw the line at two parents; a statute that contemplates three or more parents will provoke irresolvable controversy.[226]

It is also risky to propose something that entitles unwed couples to the ratification of their gestational agreements, again for two reasons. First, marital parenting is still a sacred cow, and even in this increasingly unwed society anything that facilitates unwed parenthood will attract objection. Moreover, of course, any proposal that facilitates parenthood by couples who are not permitted to marry will attract even greater objection. I believe that the Act should reach all of those couples irrespective of the political risks, because leaving them out will disadvantage the children whom they will produce anyway, regardless of the statute's scope.

The marital issue seems uncomplicated. Nothing prevents unmarried couples from employing surrogates or gestational carriers; Mark and Crispina did not have to be married in order to seek Anna's services, and Charles and David certainly were not married when they engaged Mary. We need a way to identify the parents of all children who are born to carriers and surrogates, not just those children whose intended parents are married. Conversely, it is unthinkable to jeopardize the welfare of any child just because his or her intended parents did not engage in a wedding ceremony.[227]

The issue involving homosexual couples is more controversial. I opt to extend the statute to the children of gay and lesbian couples[228] because those children equally deserve parental determinacy.[229]

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doning a particular behavior is evidence of the behavior's inadvisability. For example, Professor Martha Minow has shown that much of current American family law developed as women, assigned particular social roles by rule of law, expansively employed those roles in order to achieve "function and powers beyond those contemplated by legal rules." Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 838. Were Professor Garrison right, women would not be lawyers, for "[t]he harmony . . . of interests and views which . . . should belong[ ] to the family institution is repugnant to the idea of woman adopting a distinct and independent career from that of her husband." *Id.* at 843. (quoting Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)). I would take Professor Minow's argument one step further: Social axiom is impermanent. *See supra* note 222.

226. It would also spur the revision of innumerable state and federal statutes, such as those prescribing support responsibilities, inheritance rights and Social Security survivor benefits, that are premised on a maximum of two parents. My proposal to permit sole parenthood will necessitate some but fewer revisions. Those statutes that assign dual parental responsibilities, such as our child support statutes, will need revision to acknowledge circumstances when a parent or welfare agency may not seek support or contribution from a second parent. Other statutes, such as those providing for inheritance and Social Security survivor benefits, will require no greater revision than the modern, ubiquitous, and *de facto* phenomenon of single parenthood has already provoked.

227. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) ("[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.").

228. Lesbian couples may resort to surrogacy contracts if neither partner can achieve or risk pregnancy.

229. It is tempting to require, as a precondition to a gestational agreement's validation, that gay and lesbian parties submit to screening for sexually transmitted disease, on the theory that they are most (although not exclusively) likely to attempt the informal insemination techniques that could transmit disease. *See* ROYAL COMMISSION REPORT, *supra* note 2, at 459: "Self-insemination is going to go on; making it unavailable in the medical system will not stop it. It is therefore important that safe sperm be available so that women do not have to risk their health and lives." Children are at risk as well. *See* Stiver v. Parker, 975 F.2d 261, 263 (6th Cir. 1992).

C. Distinguishing Surrogacy from Gestational Carrying

The UPA-2000 proposes permitting both kinds of agreements. I support that policy because the alternative is elitist: If the statute applies only to gestational carrying its provisions will benefit only those who can afford IVF services (for the reason that, by definition, a gestational carrier is a woman who is not genetically related to the child she carries, and IVF is the only way to impregnate her), and IVF can be expensive.[230] True surrogacy is a cheaper alternative in clinics (because it does not require in-lab fertilization) and cheaper still at home, and will therefore probably appeal to hopeful but less pecunious parents not only among the gay and lesbian population but also among heterosexuals.[231] But the parental needs of all children are the same and the medical risks of self-help AI remain serious, so if the statute is to protect children it ought to extend its protections to children of surrogate mothers instead of limiting its protections to children of the affluent.

D. The Presumption of Legitimacy

The presumption of legitimacy is another sacred cow which, for reasons I described earlier, may be on its last legs.[232] I would exclude it entirely in this context. A woman has reproductive rights independent of her husband,[233] and

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The statute I propose does not require such screening, for the reason that it may not be ethical to mandate screening of any population at all. The issue is so new that no one really knows. Mandating medical testing "enters a new realm with . . . associated logistical and ethical dilemmas [and is] of great concern for providers and public health professionals alike. Little if any literature or commentary is available that addresses this issue." Letter from Fredericka Wolman, M.D., M.P.H., Medical Director of Maternal and Child Health Programs for the State of Maine, to John Sheldon, Judge, Maine District Court (May 17, 2001) (on file with recipient). Moreover, it may be that the gay and lesbian population is more acutely aware of the danger of such diseases, and more prepared to protect against it, than any other segment of the population.

To avoid embroiling my statutory proposal in what may be irresolvable controversy, I leave the parties to a gestational agreement free to take whatever medical precautions they deem appropriate. The statute requires the parties only to reveal what precautions they have taken or intend to take, to the end that that requirement will remind them of the importance of minimizing danger to themselves and their child.

230. The cost of a single IVF "cycle" is estimated to be between $5,000 and $10,000. ROBERTSON, *supra* note 33, at 116; BARTHOLET, *supra* note 58, at 201. It can take several "cycles" to achieve pregnancy. ROBERTSON, *supra* note 33, at 116.

A "cycle" begins with administration of fertility drugs to the prospective mother, then proceeds with the retrieval of eggs, fertilization, embryo transfer, implantation and pregnancy (if any). In IVF for gestational carriers, the process does not require the carrier's receipt of fertility drugs or the retrieval of her eggs, so it is less expensive than a full IVF cycle. But the success rate is no better; several truncated cycles may be necessary to achieve pregnancy. The natural pregnancy rate for couples who are fertile is about 20 to 25 percent (i.e., intercourse at maximum fertility produces pregnancy one out of 4 or 5 times). ROYAL COMMISSION REPORT, *supra* note 2, at 520. The pregnancy rate for IVF is subject to many variables, but hovers around 12 percent. BARTHOLET, *supra* note 58, at 208.

231. Several cases involving self-insemination by heterosexual couples have been reported. *See, e.g.*, Turchyn v. Cornelius, 1999 Ohio Ct. App. LEXIS 4129 (Ohio Ct. App. Aug. 26, 1999); Doe v. Doe, 710 A.2d 1297 (Conn. 1998); McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989); C.M. v. C.C., 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977).

232. *See* text accompanying note 25.

233. Planned Parenthood v. Casey, 505 U.S. 833, 894-95 (1992) (state requirement that a wife notify her husband that she intends an abortion unconstitutional, notwithstanding the fact that such a requirement adversely affects only 1 percent of women who obtain abortions).

there seems to be no practical reason to advance any contrary rule here. If a proposed surrogate or carrier is married and living with her husband, they will most probably discuss the idea before she commits herself. If he consents to it, the presumption will not matter to him; if he does not consent then either she will not do it or, if she does, the marriage may not have been strong enough to justify applying the presumption in the first place. If she is married but not living with her husband, the presumption ought not apply because it works a fiction, it may be impossible to find the man to obtain his waiver, and it may place the woman at risk to require her to contact him for a waiver.

The only complication arises if a married gestational mother decides to keep the child (as my proposal would permit; see discussion below). Under that circumstance, eliminating the presumption of legitimacy deprives the child of a second legal parent. As long as the mother lives (contentedly) with her husband, that is inconsequential,[234] but if she does not live with her husband, disadvantage to the child may materialize. In weighing the jeopardy to the child for lack of a second parent under this circumstance against the jeopardy to the mother for presuming her estranged husband to be the father, I have opted to reduce the mother's risk of physical harm or distress by eliminating any rule of law that might provoke her to reestablish contact with someone who may pose a danger to her.[235] One must keep in mind, however, that the chance that the birth mother will keep the

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234. The longer the mother and her child live with her husband, the more likely it is that he will incur a support obligation if the adults later divorce, irrespective of the fact that he is not related to the child. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.06(1) (Proposed Final Draft, Part I, February 14, 1997), permitting an ex-spouse to receive "compensation for the earning capacity loss arising from his or her disproportionate share during marriage of the care of . . . the children of either spouse." The ex-spouse gets post-divorce support if (a) there are children of either spouse; (b) the children, as minors, lived with both spouses and one of them spent more time caring for them than the other; and (c) "the claimant's earning capacity at dissolution is substantially less than that of the other spouse." *Id.* § 5.06(2). In other words, if Jim and Jane are married and Jane has two children from a different relationship living with them for a substantial period of time, and Jane had only a part-time job and took care of the kids more than Jim, and upon divorce Jim earns a lot more than Jane, Jim has to pay Jane *alimony* for their having raised *her* children during their marriage. Comment (b) explains that "stepparents are . . . likely to have . . . shared many of [parenthood's] benefits, and to have developed a relationship with the stepchildren that will continue after the dissolution." *Id.* § 506 comment (b).

235. Planned Parenthood v. Casey, 505 U.S. 833, 892-93, 897 (1992), *citing* Planned Parenthood v. Danforth, 428 U.S. 52 (1976):

> [C]ommon sense would suggest . . . [that i]n well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. . . .
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> . . . .
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> For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. . . [a] veto found unconstitutional in *Danforth*.

The mother would be compelled to reestablish contact with her husband if she accepted public support for her child and the public service agency paying the support pursued the husband for contribution.

child is small,[236] so the choice that I recommend will jeopardize few if any children.

E. Whether the Gestational Mother Can Keep the Child

This question is a hot potato. A statute that allows the birth mother to keep the child will be criticized for perpetuating stereotypes about women "as unstable, as unable to make decisions and stick to them, and as necessarily vulnerable to their hormones and emotions."[237] A statute that does not allow her to keep the child will be criticized for limiting the gestational mother's contractual liberties,[238] and it also contradicts a fundamental rule of adoption law, which permits the natural mother to rescind her consent to adoption after she gives it.[239] I adopt a policy of

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236. *See* Hurwitz, *supra* note 8, at 161, discussing Baby M.'s mother's decision to keep the child (footnotes omitted):

> Empirical data suggest that Mary Beth Whitehead's experience is unusual. Studies of surrogate mothers indicate that surrogates evidence low levels of maternal-fetal attachment. . . . [A] recent study of fourteen women who had been traditional (artificially inseminated) or gestational (implanted with a preembryo by means of IVF) surrogate mothers three to ten years prior to the study . . . showed that nearly all participants were significantly more affected by the relationship with the commissioning couple than with the child born of the surrogacy, and that they had formed bonds with the couple rather than with the child. None of the participants felt substantially bonded with the child.

See also FIELD, *supra* note 4, at 98 ("[T]he overwhelming majority of surrogates do perform the contract without any resistance."). There is little concern for the possibility that women will enter a gestational contract fraudulently to get a child without having to pay medical expenses. *Id.* at 98, 100 ("the overwhelming majority of surrogates do perform the contract without any resistance. . . . It seems unlikely . . . that many women will sign on as surrogates because they really want a baby for themselves but want some chump to pay for their insemination and other medical expenses.").

There is a possibility of extortion: A gestational mother holds on to the child unless the intended parents pay more than the contract price. To prevent that, I adopt the NCCUSL's proposal, in Section 807(a)(2) of the UPA-2000, to permit the court to issue an order to relinquish the child.

237. Schultz, *supra* note 56, at 384 (criticizing the Baby M. decision).

238. CARMEL SHALEV, BIRTH POWER (1989) at 9-10 ("[A]mid the serious debate on the morality of [all varieties of] medical reproduction, only surrogacy has been addressed in terms of criminal norms. It occurred to me that the reason for this was the untraditional role that women play in these arrangements.").

239. ME. REV. STAT. ANN. tit. 18-A, § 9-202 (West 1998). The statute states in part:

> (a) . . . the parents or surviving parent of a child may at any time after the child's birth . . . .
>
> (b) The court may approve a consent or a surrender and release only if the following conditions are met.
>
> (1) A licensed child-placing agency or the department certifies to the court that counseling was provided or was offered and refused . . . .
>
> (2) The court has explained the individual's parental rights and responsibilities, the effects of the consent or the surrender and release, that in all but specific situations the individual has the right to revoke the consent or surrender and release within 3 days and the existence of the adoption registry and the services available under Title 22, section 2706-A. The individual does not have the right to revoke the consent when the individual is a consenting party and also a petitioner.
>
> . . .
>
> (d) A consent or a surrender and release is not valid until 3 days after it has been executed . . . .

choice for several reasons. First, I accept Professor Martha Field's argument that doing so defuses the debate about whether surrogacy exploits women or liberates them by recognizing the validity of both views.[240] A truly exploitive rule would force every surrogate and carrier to turn over the child; a truly liberating view would give them all broad discretion.[241]

The rescission period has other benefits as well. The gestational mother's right of rescission will probably discourage non-residents seeking gestational agreements from coming to Maine, because they can go to other states, like West Virginia, which deny mothers that right and better guarantee the return on the intended parents' investment.[242] So we will avoid becoming the Reno of surrogacy, which is fine. On the other hand, I believe that intended parents from Maine will remain in Maine because the risk that the gestational mother will keep the child is so low that most resident hopefuls will find it cost-effective to stay here.[243] The UPA-2000 lowers whatever that risk might be by requiring that any surrogate or carrier must already have had at least one successful pregnancy, so she knows what she is in for. In addition, intended parents can reduce the risk even more by screening their gestation candidates with preliminary counseling. Careful selection and counseling of the gestational mother not only protects the investment, but is also the best way to prevent bilateral anguish later.[244] (I exclude counseling as

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(e) Consent may be acknowledged before a notary public who is not an attorney for the adopting parents or a partner, associate or employee of an attorney for the adopting parents when consent is given by [duly authorized public and private officials].

Id.

240. FIELD, *supra* note 4, at 78.

241. The three days after birth that I propose is less than the eight days that the NCCUSL gives the mother to revoke her consent to adoption in the Uniform Adoption Act. UNIF. ADOPTION ACT § 2 U.L.A. 60 (1994). Kentucky approaches the issue from the other direction, invalidating any consent to adoption given within 72 hours after birth. KY. REV. STAT. ANN. § 199.500(5) (Michie 1998). I have no objection to adopting either of these provisions in Maine's gestational agreement statute, except that there must be a cut-off time for the birth mother to elect to keep the child and it should be relatively short. FIELD, *supra* note 4, at 96:

> Presumably, all could live with a period of uncertainty, dependent upon the birth mother's continuing resolution, for a period of a week or less. (But if the birth mother did not affirmatively assert her right during that period, it would have to be cut off in order to avoid problems [that could arise if the natural mother disappeared after the birth but without having chosen to keep or relinquish the child].) The objection is to any period for the natural mother to revoke that would result in any lengthy uncertainty after the adoptive couple have physical custody of the child.

242. *See supra* notes 148-56 and accompanying text. *See also* ROBERTSON *supra* note 33, at 131 ("Couples who would otherwise engage [surrogacy] services might be reluctant to do so if the . . . couple's legal right to rear cannot be guaranteed in advance.").

243. *See* FIELD, *supra* note 4, at 97: "[A]lthough the couple would doubtless prefer a fully enforceable contract, making the contract depend upon the mother's continued agreement seems unlikely to undercut entirely the appeal of surrogacy arrangements. This would be particularly true if the jurisdiction had a clear rule . . . that the father would not be liable for support."

The statute I propose has such a rule.

244. ROBERTSON, *supra* note 33, at 138:

> Special attention must be paid to the needs of surrogates. They will be embarking on a major life event—pregnancy and childbirth—with the intention of then relinquishing the child they have gestated. Accurate information about medical difficulties in initiating and completing pregnancy is essential. Counseling is also essential to prepare surrogates for probable feelings of disappointment, depression, and guilt. Counseling should be provided both prior to conception and after birth to help them adjust to their situation.

a requirement under the statute I propose only because many in Maine cannot afford it, cannot conveniently obtain competent providers, and will object to the delay counseling causes—all disincentives to employ the statute's procedure; nor is there any way for courts inexpensively to assess the quality of any counseling that does occur.)

F. Donor Anonymity

Neither the NCCUSL nor I proposes changing what is currently the standard rule that donors may be anonymous and, therefore, free of parental responsibility for their genetic offspring.[245] The rule is supposed to attract more donors than would volunteer if their identities were known and liability possible.[246] Nevertheless, it may be time to consider requiring donor identification, because concern is mounting for the psychological fulfillment of donor children who need to know their genetic parents.[247] The statute I propose does not require that donors be identified because I accept the notions that donor abundance is valuable and that anonymity generates it, and I have not found any authoritative clinical statement of anonymity's psychological effect on children. But our experience with gestational agreement regulation over time may teach us to change that policy.

VI. CONCLUSION

If and when the bill I propose hits the Maine legislature it is bound to provoke controversy, but any debate about whether we should encourage gestational agreements or ban them will be fruitless. They are legal (though heavily regulated) in our neighboring state of New Hampshire, they are legal and virtually unregulated elsewhere,[248] and their popularity is likely to grow.[249] All that is left for us is to

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245. Garrison, *supra* note 49, at 898-99.

It should be emphasized that Maine does not have any such rule. Recently, the Maine Supreme Judicial Court illustrated that fact by ruling that the putative biological father of a child could prevail in a paternity action notwithstanding that the child had been born while the mother was still married to another man and that a divorce court had, with the mother's consent, declared the husband to be the father. Stitham v. Henderson, 2001 ME 52, ¶¶ 12-14, 768 A.2d 598, 602-03. The implication of that ruling is that a paternity action may also be brought *against* the putative, nonhusband father. Because that ruling does not limit the concept of "father" to one who participated in intercourse or who initiated AID or IVF-D, the law in Maine may render a sperm donor responsible. All the more reason to confront the issue directly and statutorily.

246. *Id.* at 900.

247. *See* Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES, June 18, 1995, § 6 (Magazine), at 28; Sally Jacobs, *Conception of Truth, a Few Sperm Donors, as Well as Their Offspring, Try to Span the Gulf of Reproductive Technique*, BOSTON GLOBE, Nov. 29, 2000, at F1.

248. *See supra* notes 148-56 and accompanying text.

249. This is my assumption, based on recent experience: "[T]he practice of [traditional and gestational] surrogate motherhood has become more common since . . . 1990." COMM. ON ETHICS, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, *Opinion No. 225* 1 (Nov. 1999). I downloaded the following from the website of the Organization of Parents Through Surrogacy, at http://www.opts.com (visited Feb. 2, 2001):

> There is no reliable or scientific study showing exactly how many babies have been born via surrogate parenting. From numbers reported by fertility centers, clinics and those involved in independent arrangements, it is estimated that up to 1,000 babies are being born each year in the U.S. through the option.

Organization of Parents Through Surrogacy, at http://www.opts.com/informat.htm (last visited Feb. 15, 2001).

choose a response to the fact that those of our residents who seek surrogacy and carrier services can and will get them both elsewhere and here.[250]

We have already chosen that response, in other contexts. We know that teenagers will engage in sex whether we want them to or not, so we allow family planning clinics to give them condoms. We know that heroin addicts will shoot up regardless of the legality of the practice, so we give them methadone. We regulate behavior that we scorn, if banning it unsuccessfully is worse. So we need not even pause to debate the morality of gestational motherhood. We simply have to regulate it, because not doing so jeopardizes the children who will be born of gestational mothers irrespective of what may be widespread distaste for the practice.[251]

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250. On the question of whether Maine residents can escape restrictive laws here by seeking surrogacy or carrier services elsewhere, see Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 401 (1990): "[A]ssuming residents of a restrictive state truly want to participate in surrogacy, the existence of more hospitable jurisdictions will significantly limit local control."

As for whether they are obtaining such services here, see Shoshana Hoose, *Surrogate mother's lawsuit boosts rights of birth parents in Maine*, MAINE SUNDAY TELEGRAM, Feb. 2, 1997, at 1A, describing what some consider to be the first surrogate case to reach the courts in the State. If one such case reached the courts four years ago, there can only be many more in the State that have not.

Information about surrogacy laws and services in other states is available on the Internet. I downloaded the following from a website at www.opts.com:

> OPTS—The Organization of Parents Through Surrogacy is a national surrogacy support organization for both couples through surrogacy as well as surrogate mothers. We are the country's oldest and only non-profit support group for surrogacy, offering information, networking, support and advocacy in your state. Person-to-person contact with experienced parents and surrogates is yours with a membership. So is online support through our Listserv, a packet of newsletters, our resource guides, book lists, regional meetings, legislative information and advocacy in your state. Join the hundreds of successful families that belong to OPTS. Applications are available on our Membership pages.
>
> OPTS is not affiliated with any surrogacy practitioner, agency, lawyer, etc.
>
> We offer our support services to all regardless of where they might be in the process or how they have chosen to proceed. We receive calls daily from infertile people seeking information about surrogacy.
>
> OPTS functions as a community resource. We receive referral calls from other organizations and have spoken before various commissions, boards and groups.
>
> We are available to the press for accurate information, fact-checking, comment and interviews. OPTS publishes an annual newsletter, holds regional meetings and has an extensive telephone support network. In several cities, we have women's groups which meet regularly.
>
> We welcome you to join us and receive the support of your peers who are also going down the surrogacy path.

Organization of Parents Through Surrogacy, at http://www.opts.com/opts.htm (last visited Mar. 7, 2001). OPTS indicates a post office box in Gurnee, Illinois. *Id.*

251. What I advocate for here is consumer protection: Protection in a field in which people are going to consume no matter what prohibitions we impose. Regulation instead of prohibition, to accommodate the underprivileged, is becoming a common theme in American society, and it is not limited to healthcare and drug policy. Consider this, concerning the delivery of legal services:

> [I]f consumer protection is our true objective, the current system is poorly designed to achieve it. Unauthorized practice doctrine generally focuses on whether lay providers are performing a legal task, not whether they are doing so effectively. The overly broad reach of these prohibitions, together with strong consumer demand for low-

What form should our regulation take? I propose two salient features. The first is the identification of parents to establish children's financial welfare immediately upon birth. "Given acceptance of some artificial techniques, decisions about specific issues will simply have to be made. Social policy demands that someone be committed to rearing any child brought into the world."[252] Our traditional practice has been to assign financial responsibility for a child immediately and automatically upon his or her birth. We should perpetuate that policy; there is no reason not to.

Second, we should embrace children of all gestational mothers, irrespective of our views of the morality of gestational agreements or of the conjugal or sexual preferences of the adults who brought the children into the world. We must spurn the seductive mire of controversy over surrogacy, unwed parenthood and homosexuality, because we want financial stability and good health for all children. To do otherwise is to punish the children for the behavior of the adults.[253] We must be pragmatic lest we be cruel.

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cost services, means that most lay practice goes unregulated. When abuses do occur, consumers have inadequate remedies. The absence of malpractice insurance, client security funds, or affordable claims procedures make effective recourse difficult. These remedial problems are greatest for poor, uneducated, and non-English speaking clients who are least able to bear the costs.

However, the most effective response to these problems is regulation, not prohibition. Consumers need a system that offers remedies without foreclosing choice.

Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice,* 22 N.Y.U. REV. L. & SOC. CHANGE 701, 710-11 (1996).

252. Schultz, *supra* note 56, at 330 (emphasis omitted).

253. *See* Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("[W]e have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.").

APPENDIX

MAINE GESTATIONAL AGREEMENT ACT

ARTICLE 1: GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This Act may be cited as the Maine Gestational Agreement Act.

SECTION 102. DEFINITIONS. In this Act:

(A) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. The term includes:

(1) intrauterine insemination;

(2) donation of eggs;

(3) donation of embryos;

(4) in-vitro fertilization and transfer of embryos; and

(5) intracytoplasmic sperm injection.

(B) "Child" means an individual of any age whose parentage may be determined under this Act.

(C) "Commence" means to file the initial pleading seeking an adjudication of parentage in the District Court of this State.

(D) "Consideration" means payment of value, but does not include payment of medical expenses and incidental expenses and reimbursement for other expenses related to the gestational mother's pregnancy or the child's birth and actually paid by the gestational mother.

(E) "Donor" means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. An intended parent may be a donor. A gestational mother may be a donor. The husband of a gestational mother may not be a donor.

(F) "Gestational mother" means a woman who gives birth to a child under a gestational agreement.

(G) "Incidental expenses" means all expenses actually incurred and reasonably related to the gestational mother's pregnancy.

(H) "Intended father" means a male who enters into an agreement providing that he will be a parent of a child born to a gestational mother by means of assisted reproduction, whether or not he has a genetic relationship with the child.

(I) "Intended mother" means a female who enters into an agreement providing that she will be a parent of a child born to a gestational mother by means of assisted reproduction, whether or not she has a genetic relationship with the child.

(J) "Intended parent" means an individual who enters into an agreement providing that he or she will be a parent of a child born to a gestational mother by means of assisted reproduction, whether or not he or she has a genetic relationship with the child.

(K) "Man" means a male individual of any age.

(L) "Medical expenses" includes all debts incurred that are reasonably related to the gestational mother's pregnancy and the child's birth.

(M) "Parent" means an individual who has the responsibility of supporting a child and the right to establish a parent-child relationship.

(N) "Parent-child relationship" means the social relationship between a child and a parent of the child. The term includes the mother-child relationship and the father-child relationship.

(O) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(P) "Signatory" means an individual who authenticates a record and is bound by its terms.

(Q) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

SECTION 103. SCOPE OF ACT; CHOICE OF LAW.

(A) This Act governs every determination of parentage in this State.

(B) The courts of this State shall apply the law of this State to declare who is a child's parent. The applicable law does not depend on the past or present residence of the child or the location of the child's birth.

(C) This Act does not create, enlarge, or diminish parental rights or duties under other law of this State.

SECTION 104. COURT OF THIS STATE. The District Court of the State of Maine shall have jurisdiction over all proceedings brought under this Act.

SECTION 105. PROTECTION OF PARTICIPANTS. Proceedings under this Act are subject to other law of this State governing the health, safety, privacy, and liberty of a child or other individual who could be jeopardized by disclosure of identifying information, including address, telephone number, place of employment, social security number, and the child's day-care facility and school.

SECTION 106. FILING CHARGES, FORMS. No court shall demand any charge for any forms provided by or filed with any court pursuant to this Act. The courts shall prepare forms adequate for filing in the ordinary course pursuant to the requirements of the Act, and shall assist petitioners in the preparation of such forms.

ARTICLE 2: DETERMINATION OF PARENTS

SECTION 201. RULES TO DETERMINE PARENTS

(A) (1) If the intended parents are confirmed by order under Article 3 as

the parents of a child born to a gestational mother pursuant to a gestational agreement, such order:

(a) establishes that such intended parents are the parents of the child, and

(b) bars any claim to parenthood of, or to any parental rights concerning, the child by:

(i) the gestational mother and her husband, if any, irrespective of whether her husband received notice of the contract or proceeding, and

(ii) every donor, except any intended parent who is a donor.

(2) If the gestational mother is confirmed by order under Article 3 as a parent of a child she bore pursuant to a gestational agreement, such order:

(a) establishes that she is a parent of the child, and

(b) bars any claim to parenthood of, or to any parental rights concerning, the child by:

(i) any intended parent and

(ii) any donor, other than the gestational mother herself if she is a donor and

(iii) the gestational mother's husband, if any, except that nothing in this Act limits such husband's right to adopt the child pursuant to Title 18-A of the Maine Revised Statutes.

(3) No person whose claim to parenthood of, or to any parental rights concerning, a child is barred by the preceding provisions bears any financial responsibility or other obligation for or to such child.

(4) In the absence of an order of confirmation the gestational mother is a parent of the child she bears.

(5) In the absence of an order of confirmation the intended father is a parent of the child the gestational mother bears.

(B) A child may have one parent but shall have no more than two parents.

SECTION 202. NO DISCRIMINATION BASED ON MARITAL STATUS. A child born to intended parents who are not married to each other has the same rights under the law as a child born to intended parents who are married to each other.

SECTION 203. CONSEQUENCES OF ESTABLISHMENT OF PARENTAGE. Unless parental rights are terminated, a parent-child relationship established under this Act applies for all purposes, except as otherwise provided by other law of this State.

ARTICLE 3: GESTATIONAL AGREEMENTS

SECTION 301. GESTATIONAL AGREEMENT AUTHORIZED.

(A) A prospective gestational mother, a donor or the donors, and the intended parent or parents may enter into an agreement providing that:

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;

(2) the prospective gestational mother and the donors (except an intended parent who is also a donor) relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and

(3) the intended parent or parents become(s) the parent(s) of the child.

(B) The intended parent, or both intended parents, and the prospective gestational mother must all have resided in this state for at least 90 days prior to filing a petition to confirm the gestational agreement.

(C) The intended parents and the prospective gestational mother must all be parties to the agreement.

(D) A gestational agreement is enforceable only if confirmed as provided in Section 307.

(E) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.

(F) A gestational agreement may provide for payment of consideration to the gestational mother.

(G) A gestational agreement shall permit the gestational mother to assert her parental rights over the child(ren) she bears in consummation of the agreement, within three business days of the birth(s) (not including Saturdays, Sundays and official holidays).

(H) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo(s) or fetus(es), including but not limited to medical treatment, selective reduction and abortion.

(I) The husband of a prospective gestational mother may not be a donor under the agreement.

SECTION 302. REQUIREMENTS OF PETITION TO VALIDATE AGREEMENT.

(A) The intended parents and the prospective gestational mother may file a petition in the District Court closest to the residence of any of them to validate a gestational agreement.

(B) The petition shall contain:

(1) the names, ages, current residences and current mailing addresses of the intended parents and of the prospective gestational mother;

(2) a statement that the prospective gestational mother has had at least one pregnancy that resulted in a live birth, and that her bearing another child or other children will not pose an unreasonable health risk to the unborn child(ren) or to the physical or mental health of the prospective gestational mother;

(3) a statement that the intended parents, the prospective gestational mother and the donor or donors are all at least 21 years of age;

(4) a statement that the intended parents and the prospective gestational mother have been residents of this state for at least 90 days prior to the filing of the petition;

(5) a statement that the intended parents understand that the gestational mother has the right to make decisions to safeguard her health or that of the embryo(s) or fetus(es);

(6) a statement that the intended parents understand that the gestational mother has the right to invalidate the agreement and assert her parental rights over the child(ren) she bears within three business days of the child(ren)'s birth;

(7) a statement that the gestational mother has three business days after the birth(s) of the child(ren) to file with the court written notice of her intent to assert parental rights over the child(ren), and that if she does so she shall be the sole parent of the child(ren) and the intended parents shall have no parental rights or responsibilities regarding the child(ren);

(8) a statement that if the gestational mother does not file written notice of her intent to assert parental rights within three business days of the birth(s) the intended parents will be deemed the sole parents of the child(ren) upon confirmation by the court;

(9) a statement that the intended conception shall occur within 180 days of the validation of the agreement and that if it does not, the petitioners shall reapply to the court for validation;

(10) a description of the provisions that have been made for all reasonable health-care expenses associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated;

(11) a description of the consideration, if any, paid to the prospective gestational mother, and the terms of payment;

(12) a description of the means the parties have employed or will

employ to reduce the risk to them and to the child(ren) of sexually transmitted disease;

(13) this statement, in conspicuous print: The court's validation of your gestational agreement does not relieve you of the important responsibility to take all reasonable precautions to assure the health and welfare of yourself, of the other parties to the agreement and of the child, including but not limited to reasonable medical and psychological care.

(C) The petition shall be signed, under oath or affirmation, before a clerk of the court in which it is filed, by the intended parent or by both intended parents, and by the prospective gestational mother.

SECTION 303. COURT VALIDATION OF THE GESTATIONAL AGREEMENT. A presiding judge shall review the petition and accompanying documentation as soon as practical after its filing. If the judge is satisfied that the petition and documentation provide the information required by, and meet the formal requirements of, this statute, the judge shall issue an order validating the agreement. If the judge is not so satisfied, the judge shall meet with one or more of the petitioners, explain the deficiencies that have caused the judge to withhold validation, and offer the petitioners the opportunity to correct such deficiencies. The judge may meet with any petitioner ex parte. The judge shall not withhold validation for any reason except

(1) that the petition and accompanying documentation do not provide all information required by the statute;

(2) that the petition and accompanying documentation do not meet the formal requirements of the statute;

(3) that the judge doubts the veracity or credibility of any matter in the petition or accompanying documentation;

(4) that in the judge's discretion the judge deems the gestational agreement unconscionable. A determination of unconscionability shall not be based on a consideration of the best interest of the child.

SECTION 304. INSPECTION OF RECORDS. The proceedings, records, and identities of the individual parties to a gestational agreement under this Article are subject to inspection under the standards of confidentiality applicable to adoptions as provided under other law of this State.

SECTION 305. EXCLUSIVE, CONTINUING JURISDICTION. Subject to the jurisdictional standards of Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act, the court conducting a proceeding under this Article has exclusive, continuing jurisdiction of all matters arising out of the gestational agreement until the court issues a final order of confirmation.

SECTION 306. TERMINATION OF GESTATIONAL AGREEMENT.

(A) After issuance of an order under this Article, but before the prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother or any intended parent may ter-

minate the gestational agreement by filing notice of termination with the court and delivering identical notice to all other parties to the agreement.

(B) Upon petition by any intended parent, donor or the prospective gestational mother, the court may, after notice and hearing but before the prospective gestational mother becomes pregnant, and for good cause shown, terminate the gestational agreement.

(C) Neither a prospective gestational mother nor her husband, if any, is liable to the intended parents for terminating a gestational agreement pursuant to this section, or for any de facto termination that occurs as the result of the gestational mother's exercise of any of the rights to which she is entitled under this Act.

SECTION 307. CONFIRMATION OF GESTATIONAL AGREEMENT. After the birth of a child(ren) to a gestational mother pursuant to a gestational agreement:

(A) Within three business days of the birth(s) the gestational mother may file with the court a notice to assert her parental rights over the child. In the event of multiple births, the notice shall assert her parental rights over all of the children. If she files such notice, the court shall issue an order confirming that she is a parent of the child(ren).

(B) However, if no such notice is timely filed, and after the three day period has expired, the intended parents, the gestational mother, or any one of them, or any person or organization on behalf of any of them, shall file with the court a request for confirmation of their parenthood. Upon receipt of such request, the court shall issue an order confirming that the intended parent(s) is(are) the parent(s) of the child(ren) and that the gestational mother is not.

(C) Any notice filed by the gestational mother, and any request for confirmation filed by any petitioner, shall name the intended parent(s), the gestational mother, and the gestational mother's husband, if any, and shall indicate the place and date of the birth(s) of the child(ren), the birth weight(s) and gender(s) of the child(ren), and the name(s) of the child(ren) if any.

(D) The filing of a request for confirmation binds both intended parents to the subsequent court confirmation.

(E) If no timely notice is filed by the gestational mother, and no request for confirmation is filed within 60 days of the date of the child(ren)'s birth(s), the parenthood of the child(ren) is determined by Article 2.

(F) In the event of multiple births, the gestational mother may assert her parental rights as to all of the children or to none of them.

SECTION 308. EFFECT OF CONFIRMATION OF GESTATIONAL AGREEMENT. Upon issuing an order confirming parenthood the court shall direct the [agency maintaining birth records] to issue a birth certificate naming the confirmed parent(s) as parent(s) of the child(ren), and issue any necessary orders for the surrender of the child(ren) to the confirmed parent(s).

SECTION 309. GESTATIONAL AGREEMENT: EFFECT OF SUBSEQUENT MARRIAGE. After the issuance of an order of validation or confirmation under this Article, subsequent marriage of the gestational mother does not affect the validity of a gestational agreement, her husband's consent to the agreement is not required, and her husband is not a presumed father of the resulting child.

SECTION 310. EFFECT OF UNCONFIRMED GESTATIONAL AGREEMENT.

(A) A gestational agreement, whether in a record or not, that is not judicially validated before the conception of a child (ren) and confirmed after the birth(s) of a child (ren) is not enforceable.

(B) Individuals who are the intended parents under a gestational agreement that is not validated and confirmed by court order may be held liable for support of the resulting child(ren), even if the agreement is otherwise unenforceable. The liability under this subsection includes assessing all maternity expenses and court fees, including testing and expert witness fees.

(C) The husband of a gestational mother, who gives birth pursuant to an agreement that is not judicially validated and confirmed, is not the legal father of any child so born.

SECTION 311. EFFECT OF ALLEGATION THAT CHILD IS NOT RESULT OF ASSISTED REPRODUCTION

(A) If the parentage of any child born to a gestational mother is alleged not to be the result of assisted reproduction, in a writing filed with the court, the court shall on its own motion notify the petitioners, order genetic testing, and engage in any other procedure available under law to determine the parentage of the child. The court may appoint a guardian ad litem for the child and counsel for any of the petitioners and any other alleged parent. If, after conducting a hearing compatible with ordinary standards of parentage law, the court is satisfied that the child is not the result of assisted reproduction, the court shall declare the identity of the parents, and exclude nonparents to the extent permitted by law, and shall assess costs and litigation expenses in its discretion. Such a declaration supersedes any prior confirmation under this Article.

(B) An allegation under this Section may be filed with the court within two years of the confirmation of the gestational agreement, except that the child born or alleged to have been born pursuant to the agreement may file such an allegation at any time.

SECTION 312. EFFECT OF INSIGNIFICANT DEFECTS. Defects in form and procedure, and deviations from specific provisions of this Act, that do not affect substantial rights shall not invalidate any gestational agreement or the validation or confirmation of any gestational agreement.